

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN

PART 3

Index Number : 650333/2011

SLADE, IRA L

vs.

NEWMAN, LOUIS I

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO.

650333/11

MOTION DATE

6/8/11

MOTION SEQ. NO.

001

MOTION CAL. NO.

on this motion to/for _____

PAPERS NUMBERED

1

2

3

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 8-12-11



HON. EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X
IRA L. SLADE,

Plaintiff,

-against-

LOUIS I. NEWMAN,

Defendant.

Index No.: 650333/11
Mtn. Date: June 8, 2011
Mtn. Seq. No.: 001

-----X
PRESENT: HON. EILEEN BRANSTEN, J.S.C.

Plaintiff Ira L. Slade ("Plaintiff") moves, pursuant to CPLR § 3213, for summary judgment in lieu of a complaint. Defendant Louis I. Newman ("Defendant") opposes the motion.

BACKGROUND

In 2001, Plaintiff and Defendant, both attorneys, started a law firm together. Transcript of Hearing of June 8, 2011 ("Hearing Tr.") at 4:12-17. To aid with the firm's start-up, Plaintiff agreed to loan \$135,000 to Defendant. Plaintiff's Affirmation in Support of CPLR § 3213 Motion for Summary Judgment in Lieu of Complaint ("Pl.'s Affirm.") at ¶ 3. Plaintiff provided Defendant with six checks and one wire transfer between 2001 and 2002, together totaling \$135,000. *Id.*

To memorialize Defendant's obligation to repay the \$135,000, Defendant presented to Plaintiff a handwritten note signed and dated March 31, 2009 (the "Note"). Pl.'s Affirm. at ¶ 8. The Note states:

“Ira[,] At the time the firm started and shortly thereafter you, between 2001 and 2002, advanced funds to me totaling \$135,000 on a no interest basis. This letter will serve to confirm that I owe you the \$135,000, without interest.”

Pl.’s Affirm., Ex. A.

Plaintiff contends that Defendant failed to make any repayment of the \$135,000 loan. Plaintiff thus sent Defendant a demand letter dated January 28, 2011 for payment of the \$135,000 in full. Pl.’s Affirm. at ¶¶ 4-5. The demand letter set the date of repayment for February 3, 2011. *Id.* Plaintiff alleges that, despite receipt of the demand letter, Defendant still refused to and did not pay the amount due by February 3, 2011. *Id.* at ¶ 11.

On February 4, 2011, Plaintiff brought this motion for summary judgment in lieu of a complaint pursuant to CPLR § 3213. Plaintiff alleges that, because he has demonstrated Defendant’s indebtedness and failure to pay on due demand, he is entitled to summary judgment in lieu of a complaint to recover the \$135,000, plus the legal rate of interest computed from the date set for repayment, February 3, 2011.

ANALYSIS

CPLR § 3213 provides, in pertinent part: “[w]hen an action is based upon an instrument for the payment of money only ... the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.”

The typical example of an “instrument for the payment of money,” upon which the action must be based, is an unconditional promise to pay a sum certain, signed by the

promisor and due on demand or at a definite time. *Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 443-444 (N.Y. 1996). Cases applying CPLR § 3213 usually involve commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness. *O&M Gourmet Foods v. Marino's 184 Foods*, 225 A.D.2d 340 (1st Dep't 1996) (promissory note not in dispute); *see also Eastbank, N.A. v. Phoenix Garden Restaurant*, 216 A.D.2d 152 (1st Dep't 1995) (unconditional guarantee of a promissory note).

The First Department has held:

The statute is not limited to negotiable and nonnegotiable paper within the terms of article 3 of the Uniform Commercial Code, as suggested by defendant. CPLR [§] 3213 contains no such restriction nor does the policy underlying this procedure.

Maglich v. Saxe, Bacon & Bolan, P. C., 97 A.D.2d 19, 22 (1st Dep't 1983); *see also Channel Excavators, Inc. v. Amato Trucking Corp.*, 48 Misc. 2d 429, 430 (N.Y. Sup. Ct., Nassau County 1965) ("to come within the section the instrument need not be a negotiable instrument"). Nonnegotiable paper comes within CPLR § 3213 "to provide a speedy and effective means of securing a judgment on claims presumptively meritorious." *Interman Indus. Prods. v. R. S. M. Electron Power*, 37 N.Y.2d 151, 154 (1975).

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor ... and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts

sufficient to require a trial of any issue of fact.’” *Zuckerman v. New York*, 49 N.Y.2d 557, 563 (N.Y. 1980) (citations omitted).

I. Plaintiff has brought forth a prima facie case upon an “instrument for the payment of money” for purposes of CPLR § 3213

A. Arguments

1. *Defendant*

Defendant argues that the March 31, 2009 Note does not fall under the purview of CPLR § 3213. Defendant contends that the Note does not contain “an unconditional promise to pay a sum certain over a stated period of time” or an “explicit promise to pay” and, thus, is not an “instrument for the payment of money only” upon which a case can be brought pursuant to CPLR § 3213. Defendant’s Affidavit in Opposition (“Def.’s Aff.”) at ¶¶ 13-14.

Defendant further argues that the Note does not fall under Article 3 of the Uniform Commercial Code, as Plaintiff contends. Defendant argues that the Note is neither commercial paper nor a negotiable instrument. Def.’s Aff. at ¶ 18. Defendant contends that Plaintiff incorrectly attempts to apply U.C.C. § 3-108 to establish a payment term, where none exists, to make the Note payable on demand. *Id.* at ¶ 19. Defendant argues that Plaintiff conclusorily states that the Note is a “promissory note due on demand” without providing any law or authority to convert the document into a promissory note. *Id.* at ¶ 20. Defendant contends that as the Note fails to contain language that the “maker” is obligated to “pay” or “promises to pay” a stated sum to the “order of” any person at a “time certain” or a “place certain,” the March 31, 2009 writing is not a “promissory note.” *Id.* at ¶¶ 23-25.

Thus, Defendant maintains that the documentary evidence fails to constitute an “instrument for the payment of money” upon which a prima facie case can be brought pursuant to CPLR § 3213.

2. Plaintiff

In response, Plaintiff maintains that Defendant’s arguments are irrelevant or factually misleading. Plaintiff further states that Defendant fails to deny facts underlying the Defendant’s purported liability on the debt. The pertinent facts, which Defendant have not denied, are:

- A. That [Defendant] endorsed and cashed the checks written to him and received the one wire transaction to him for a total of \$135,000 (Exhibit “B” to the moving papers); [and]
- B. That [Defendant] signed the March 31, 2009 [Note] (Exhibit “A” to the moving papers); [and]
- C. That [Defendant] received the [January 28, 2011] demand letter [Plaintiff] sent him ... (Exhibit “C” to the moving papers); [and]
- D. That [Defendant] never repaid any of the \$135,000 [P]laintiff loaned to him....

Plaintiff’s Reply Affirmation in Support of CPLR § 3213 Motion for Summary Judgment in Lieu of a Complaint (“Pl.’s Reply”) at ¶ 2.

Plaintiff states that the March 31, 2009 Note constitutes a promissory note, and the checks and wire transfer constitute evidence of the loan transaction. Pl.’s Reply at ¶ 6. Plaintiff maintains that Defendant does not deny receiving any of the payments.

Plaintiff also points out that Defendant added “without interest” on the Note. *Id.* at ¶ 9. Plaintiff contends this addition evidences Defendant’s failure to dispute the repayment obligation. *Id.*; see Pl.’s Affirm., Ex. A. Plaintiff provides the January 28, 2011 demand letter dated as evidence of Defendant’s default. Upon these grounds, Plaintiff states that he has met his burden in showing the existence of an instrument and a failure to pay. Plaintiff contends that the burden therefore falls on Defendant to raise any relevant factual issues preventing summary judgment.

B. Court’s Determination

CPLR § 3213 treatment has been applied to written instruments which, although technically not commercial paper, unconditionally acknowledge a debt obligation. *Maglich*, 97 A.D.2d at 21-22; see also *Baker v. Gundermann*, 276 N.Y.S.2d 495 (1966) (letter evidencing a debt obligation for a fixed period at a stated rate of interest); *Ace Office Cleaning Corp. v. Brodsky, Hopf & Adler*, 364 N.Y.S.2d 737 (1975) (letter acknowledging debt in amount set forth in account stated).

In support of his argument that the Note affords no relief pursuant to CPLR § 3213, Defendant cites to *Channel Excavators, Inc. v. Amato Trucking Corp.*, 48 Misc.2d 429 (N.Y. Sup. Ct., Special Term, Nassau County 1965), a case that, at first glance, is similar to the one at bar. In *Channel*, the court denied summary judgment on a note which provided that the defendant owed the plaintiff an amount stated because the note was not an instrument for the payment of money as prescribed by CPLR § 3213. *Id.* However, that case may be

distinguished. The note at issue therein was not signed, and thus, the determination of the action would depend upon proof of facts outside the instrument. *Id.* at 430. The case was thus not appropriate for resolution pursuant to CPLR § 3213.

Defendant also raises a factual issue as to whether the Note is a “promissory note.” Defendant contends that the Note is not a promissory note because the Note does not contain an unconditional promise to pay a sum certain over a stated period of time, as required by the U.C.C.

Although the Note does not contain an unconditional promise to pay or a stated period of time, and thus, is not a promissory note as defined by the U.C.C., the Note, nonetheless, is an instrument for the payment of money upon which a case can be brought pursuant to CPLR § 3213. Whether the Note constitutes a “promissory note” or any other negotiable instrument under the U.C.C. does not affect Plaintiff’s prima facie case.

Plaintiff here has provided documentary evidence that demonstrates prima facie evidence of Defendant’s indebtedness and default. Plaintiff has therefore met his burden pursuant to CPLR § 3213. Defendant must therefore present a triable issue of fact preventing summary judgment.

II. Plaintiff’s Exhibit B Should be Considered

A. Arguments

1. *Defendant*

Defendant opposes the use of Plaintiff’s Exhibit B. Defendant states that Exhibit B is an undated “summary sheet.” Defendant alleges that the summary sheet was created for

purposes of litigation, and for which there is no sworn statement providing that it was made contemporaneous with any event. Def.'s Aff. at ¶ 34. Defendant also states that Exhibit B was never presented to the affiant. *Id.* at ¶ 35. Defendant further states that it contains checks with handwritten notes that were not on the original documents. *Id.* at ¶ 36. Defendant argues that the "Siebert" statement evidencing the wire transfer does not establish any connection between Plaintiff and Defendant. *Id.* at ¶ 37. On these bases, Defendant argues that Exhibit B lacks probative value and should not be considered.

2. *Plaintiff*

In response, Plaintiff contends that Defendant's arguments are baseless as Defendant fails to deny making or signing the Note and fails to claim that he repaid the debt. Pl.'s Reply at ¶¶ 14-16. Plaintiff further states that Exhibit B is not intended as part of the Note but only introduces the checks and wire transfer evidencing Plaintiff's provision of the \$135,000 reflected in the Note to Defendant. *Id.* at ¶ 17. Plaintiff also avers that there are no "handwritten notations" on the checks as they were made and negotiated by Defendant, and processed by the depository banks. *Id.* at ¶ 18.

B. Court's Determination

Defendant's argument that Exhibit B lacks probative value is unconvincing. Exhibit B, which consists of photocopies of checks and a summary sheet listing the checks and wire transfer, is relevant as evidence of the loan transaction. Defendant does not refute that the checks and wire transfer were advanced to him for purposes of the loan. Moreover, the checks do not contain handwritten notations that question the checks' authenticity. As

Defendant fails to assert any viable argument against Plaintiff's Exhibit B, it will be considered, and does not present an issue of fact preventing summary judgment.

III. Defendant's Claim for Breach of Fiduciary Duty is No Defense

A. Arguments

1. Defendant

Defendant argues that because the loan was a part of the formation of the firm "Slade & Newman," Plaintiff breached his fiduciary obligations to Defendant as a business partner. Def.'s Aff. at ¶¶ 40- 41. Plaintiff's alleged breaches include: "not devoting his full time and attention to the business of the firm, incurring receivables at the expense of the firm for which receivables there was little change of payment, retaining cases over objection of a partner, retaining an associate who was not functioning in the best interests of the firm, and engaging in transactions with clients which were not in keeping with the best interests of the firm." *Id.* at ¶ 43. Defendant avers that because of Plaintiff's breach of fiduciary duties, Defendant sustained damages. Defendant argues that Plaintiff is therefore precluded from a summary judgment against him. *Id.* at ¶ 44.

2. Plaintiff

In response, Plaintiff maintains that collateral agreements or understandings with respect to the firm and/or partnership are extraneous to the Note. Pl.'s Reply at ¶ 11. Plaintiff further argues that claims based on such agreements or understandings are not valid

defenses to an action to recover on a note. *Id.* Plaintiff thus argues that Defendant's claim for breach of a fiduciary obligation, a claim based upon a purported agreement outside the Note, is not a defense. Plaintiff points out that the Note makes no reference to the Slade & Newman law firm or to any agreement between the partners. *Id.* Thus, Plaintiff argues that Defendant's claim is: (a) unrelated to the transaction at issue; (b) is not a defense to his failure to repay his personal debt to Plaintiff; (c) and is not a defense or justification to Defendant's neglect or failure to make a proper showing of any legally valid reason that summary judgment should not be granted to Plaintiff. *Id.* at ¶ 12.

B. Court's Determination

It is "well established that . . . assertion of defenses based on facts extrinsic to the instrument are insufficient to defeat a motion brought pursuant to CPLR [§] 3213." Defendant's claim for breach of fiduciary duty, unrelated to the Note, is no defense to his obligation to repay the money he received as per his obligation under the Note. *Midtown Neon Sign Corp. v. Miller*, 196 A.D.2d 458, 459 (1st Dep't 1993) (holding that claims of a breach of fiduciary duty did not constitute either a defense to a claim for payment on a note or a basis for the note's cancellation).

Plaintiff has proven the existence and validity of an instrument for the payment of money. Because Defendant brings forth no factual issue regarding the existence, demand and default of the loan obligation pursuant to the Note, Plaintiff is entitled to summary judgment for the amount of \$135,000 plus interest computed as of February 3, 2011.

ORDER

Accordingly, it is

ORDERED that plaintiff's CPLR § 3213 motion for summary judgment in lieu of complaint is granted and the Clerk is directed to enter judgment in favor of the plaintiff and against defendant in the amount of \$135,000, together with interest at the statutory rate from the date of this motion, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the Decision and Order of the Court.

Dated: August 12, 2011
New York, New York

ENTER


Hon. Eileen Bransten