

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

779

CA 14-01668

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, VALENTINO, AND DEJOSEPH, JJ.

STEPHEN DIVITO, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ZASTAWRNY LLC, DEFENDANT-RESPONDENT.

CHENEY & BLAIR, LLP, GENEVA (DAVID D. BENZ OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

THE WOLFORD LAW FIRM LLP, ROCHESTER (JAMES S. WOLFORD OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 16, 2014. The order denied plaintiff's motion for summary judgment in lieu of complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: By motion for summary judgment in lieu of complaint (see CPLR 3213), plaintiff moved for judgment in the amount of \$50,000, plus interest, pursuant to an agreement for the purchase of a chiropractic business. Contrary to plaintiff's contention, we conclude that Supreme Court properly denied the motion on the ground that plaintiff failed to establish that the agreement qualifies as "an instrument for the payment of money only" (CPLR 3213). "Where, as here, an agreement 'requires something in addition to [an] explicit promise to pay a sum of money, CPLR 3213 is unavailable' " (*Whitley v Pieri*, 48 AD3d 1175, 1176, quoting *Weissman v Sinorm Deli*, 88 NY2d 437, 444). In light of our determination, we do not address plaintiff's remaining contention.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court