

Simbonis v Newns

2007 NY Slip Op 30495(U)

March 26, 2007

Supreme Court, New York County

Docket Number: 0603620/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT.

PART 10

Index Number : 603620/2006

SIMBONIS, STANLEY

vs

NEWS, BERNARD

Sequence Number : 001

SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

§ 3213

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

APR 03 2007

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: March 26, 2007

HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Supreme Court of the State of New York
County of New York: IAS Part 10

-----X
STANLEY SIMBONIS,

Plaintiff,

DECISION/ORDER

Index # 603620/06

-against-

Mot Seq. #001

BERNARD NEWNS,

Present:

Hon. Judith J. Gische

J.S.C.

Defendant.
-----X

Pursuant to CPLR sec. 2219(a) the following numbered papers were considered by the court in connection with this motion:

PAPERS

Notice of Motion, SS affidavit, exhs	1
BN affid. In Opp	2
JMC Affirm	3

FILED
APR 03 2007
NEW YORK
COUNTY CLERK'S OFFICE

Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff moves for summary judgment in lieu of complaint. CPLR § 3213. Defendant opposes the motion. Plaintiff's action is based upon a "promissory note" made on March 3, 2005.

The document dated March 3, 2005 is signed as agreed to by both parties. It acknowledges that between November 26, 2002 and October 28, 2003 plaintiff loaned defendant \$125,000. The parties further acknowledge that although defendant had paid interest on the loaned money, as of March 3, 2005

the entire principal sum was still outstanding. The document, however, does not set out an interest rate nor does it indicate when the loan comes due.

Plaintiff made several verbal demands for the money. Finally on August 31, 2005 plaintiff sent a written demand for repayment of the loan along with interest. Interest appears to have been calculated at the rate of 6%.

Despite demand, no payment was made.

Defendant's only opposition to this motion is that the August 31, 2005 demand is a nullity. He argues that after the demand, but before this action was brought, plaintiff brought a prior action for repayment of the loan. Plaintiff voluntarily discontinued that prior action after defendant raised an issue about service of process. Defendant claims that in order to commence this second action plaintiff is required to send him a new demand for payment.

In general, the March 3, 2005 document qualifies an instrument for the payment of money only. CPLR § 3213. Although plaintiff seeks the principal sum of \$127,000, the note only documents a loan in the amount of \$125,000. The note does not contain the interest rate, but defendant does not contest interest as calculated in the demand at 6% per annum. Plaintiff has otherwise established that defendant has not repaid the amounts loaned him.

The court rejects defendant's argument that plaintiff was required to make a new demand for payment after the prior action was discontinued. The prior action was discontinued without prejudice. There is no authority cited by defendant that the earlier discontinuance vitiates the demand for payment.

Accordingly plaintiff's motion for summary judgment in lieu of complaint is granted. The clerk is directed to enter a judgment in favor of plaintiff and against defendant in the amount of \$125,000. Interest is awarded at the rate of 6% per annum from March 3, 2005 until the date of entry of judgment.

Conclusion

IT IS HEREBY

ORDERED that plaintiff's motion for summary judgment in lieu of a complaint is granted; and it is further

ORDERED that the clerk shall enter judgment in favor of plaintiff Stanley Simbonis against defendant Bernard News in the amount of One Hundred Twenty Five Thousand Dollars (\$125,000), with interest thereon at the rate of Six Percent (6%) per annum from March 3, 2005 until the date of entry of judgment; and it is further

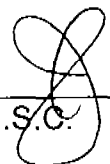
ORDERED that any requested relief not otherwise expressly granted herein is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: March 26, 2007
New York, New York

FILED
APR 03 2007
NEW YORK
CLERK'S OFFICE

^C
SO ORDERED:



J.G. J.S.C.