

Sunshine v International Barcode Corp.

2007 NY Slip Op 30935(U)

April 23, 2007

Supreme Court, New York County

Docket Number: 0101564/2007

Judge: Jane S. Solomon

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

PRESENT: Solomon
Justice

PART 55

SUNSHINE, PAUL

INDEX NO. 101564/2007

MOTION DATE 3-26-07

- v -

MOTION SEQ. NO. 001

INTERNATIONAL BARCODE

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion to/for summary judgment in lieu of complaint

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

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits _____

4-5

Replying Affidavits _____

6-7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

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

FILED
APR 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/23/07

JANE S. SOLIMON, J.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : IAS PART 55

-----X

PAUL SUNSHINE,

Plaintiff,

-against-

INDEX NO. 101564/07

INTERNATIONAL BARCODE CORPORATION

DECISION AND ORDER

Defendant.

-----X

JANE S. SOLOMON, J.

Plaintiff Paul Sunshine ("Plaintiff") moves under CPLR § 3213 for summary judgment in lieu of complaint to recover \$82,000 and interest on a promissory note (the "Note") made payable to him by defendant International Barcode Corporation ("Defendant"). For the reasons described herein, the motion is granted.

Defendant admits the Note, but defends on the ground that it paid Plaintiff's salary for two years, amounting to over \$400,000, and that he did not earn it. In or about November 2004, Defendant appointed Plaintiff as its vice president with a salary of \$160,000, plus expenses. Defendant claims the total package was worth over \$200,000 per year. Defendant further alleges that Plaintiff submitted false reports, leading it to believe that he had generated a great deal of business that would lead to its financial success.

The Note, dated December 7, 2004 and signed by Defendant, was for \$100,000 and originally payable in two years, with quarterly interest payments at 5% until maturity. On October 31, 2005, the parties entered into a Note Modification Agreement, under

which repayment became due a year earlier, namely on December 7, 2005. Plaintiff alleges that Defendant has repaid \$18,000 in principal and \$2,800 in interest, but despite his demands, has failed and refused to make additional payments since the Note became due on December 7, 2005.

Plaintiff moves for summary judgment in lieu of complaint for the amount of \$82,000, together with attorney's fees, costs and disbursements. Defendant does not deny that it owes Plaintiff on the Note, but claims that it was one of several integrated documents and agreements executed between the parties. Defendant argues that it has a cognizable, legitimate and bonafide claim against Plaintiff for breach of his employment agreement with it, and that this gives rise to a counterclaim, setoff and right of recoupment against the amount due on the Note.

The Note is an instrument for the payment of money only, and defenses raised based on facts extrinsic to the Note will not preclude CPLR § 3213 consideration. Alard v. Weiss, 1 A.D.3d 131 (1st Dep't 2003). Moreover, counterclaims for breach of a simultaneously executed employment agreement will not defeat summary judgment on the Note. See Logan v. Williamson & Co., 64 A.D.2d 466, (4th Dep't 1978); Dresdner Bank AG. v. Morse/Diesel, Inc., 115 A.D.2d 64 (1st Dep't 1986); BDO Seidman, LLP v. Bloom, 799 N.Y.S.2d 159 (Sup. Ct. N.Y. Co. 2004).

Plaintiff's request for attorney's fees, which are permitted under Section 6 of the Note, and interest must be sent to

a Special Referee. While Plaintiff is entitled to attorney's fees and interest, he has not submitted evidence of the sum sought; nor is the basis of the claimed \$2,800 in interest made clear.

Accordingly, it hereby is

ORDERED that Plaintiff's motion for summary judgment in lieu of complaint is granted as to liability, and he is entitled to judgment under the Note in the amount of \$82,000, with interest at the statutory rate from December 7, 2005; and it further is


ORDERED that the issue of how much Defendant owes to Plaintiff for reasonable attorney's fees and for interest prior to December 7, 2005, is referred to a Special Referee to hear and report with recommendations; and it further is

ORDERED that this motion shall be held in abeyance pending the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403; and it is further

ORDERED that a copy of this order with notice of entry shall be served by hand within 45 days on the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee, failing which the Clerk is directed to enter judgment in favor of Plaintiff and against Defendant for \$82,000 with interest from December 7, 2005, together with costs and disbursements as taxed.

Dated: April 23, 2007

FILED
APR 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

ENTER: 

J.S.C.
JANE S. SOLDANO