

McEnroe v Salander

2007 NY Slip Op 33512(U)

October 23, 2007

Supreme Court, New York County

Docket Number: 0601599/2007

Judge: Emily Jane Goodman

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

PRESENT: **EMILY JANE GOODMAN**

PART 17

Justitia

Index Number : 601599/2007

MCENROE, JOHN

vs •

SALANDER, LAWRENCE

Sequence Number : 001

SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ are filed in support of 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

is granted

is decided for

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

FILED
OCT 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/23/07

EJG

EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----x
John McEnroe

Plaintiff,

Index No. 601599/07

-against-

Lawrence Salander and the Salander-
O'Reilly Galleries,

Defendants.

-----x
Emily Jane Goodman, J.S.C.:

This motion arises out of a dispute between tennis champion John McEnroe and gallery owner Lawrence Salander, involving McEnroe's purchase of a partial (one-quarter) interest in a 1931 oil painting by painter Marsden Hartley, entitled Dogtown. The painting was sold by defendants, and plaintiff sues for a percentage of the profits, i.e., \$325,000. Recently the gallery was shut down by another Justice of this Court, based on allegations that the gallery stole artwork and money from clients.

Plaintiff moves, pursuant to CPLR 3213, for an order granting summary judgment in lieu of complaint against defendants in the amount of \$325,000, plus interest from March 5, 2007, at the annual rate of 15 percent, plus attorneys fees. The motion is based on an October 5, 2006 letter from the Salander-O'Reilly Galleries, LLC to

* 3]

John McEnroe c/o Burton Goldstein, plaintiff's business manager (the October 5th letter) and an April 16, 2007 letter from Salander-O'Reilly Galleries, LLC to Burton Goldstein (the April 16th letter). Defendants oppose the motion, maintaining that the letters do not constitute an "instrument for the payment of money only." Defendants also argue that they are not in default because subsequent to the filing of this motion, they paid plaintiff \$200,000 to cover an initial installment and monthly installments of \$50,000 for May through June, 2007. Moreover, they claim that the transaction was not an investment, but rather a loan, which is unenforceable because it is usurious. Because plaintiff has not met his burden to demonstrate that the agreements constituted an "instrument for the payment of money only," the motion is denied and plaintiff is directed to serve a complaint, which defendants shall answer within 20 days.

"When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint" (Weissman v Sinorm Deli, Inc, 88 NY2d 437, 443 [1996]). "The prototypical example of an instrument within the ambit of the statute is of course a negotiable instrument for the payment of money--an unconditional promise to

* 4]

pay a sum certain, signed by the maker and due on demand or at a definite time" (id. at 444).

"Where the instrument requires something in addition to defendant's explicit promise to pay a sum of money, CPLR 3213 is unavailable" (id.) Thus, "[t]he instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (id.; see also Kerin v Kaufman, 296 AD2d 336, 337 [1st Dept 2002]).

Here, plaintiff has not demonstrated that he is entitled to recover pursuant to CPLR 3213. Questions of fact exist which require the Court to look beyond the face of the documents, or, a de minimis deviation therefrom.

The October 5th letter from the Salander-O'Reilly Galleries provides:

This will confirm the agreement between John McEnroe and Salander-O'Reilly Galleries regarding the following picture: Marsden Hartley, Doqtown, 1931, oil on board, 22 inches by 25 inches. The picture was purchased for a total of \$650,000. John McEnroe has agreed to buy a one-quarter share on October 5, 2006 for \$162,500. The picture has been sold for \$1,300,000 payable on or before March 5, 2007. The picture will be insured wall-to-wall by Salander-O'Reilly Galleries. John McEnroe's end of this deal is guaranteed by me personally; should the buyer fail to pay for the Marsden Hartley picture on or before March 5, 2007 I will reimburse John McEnroe for cost and his end of the profit or \$325,000.

The April 16th letter from the Salander-O'Reilly Galleries provides:

* 5]

Enclosed is a check for \$50,000 representing one-half of down payment on monies due. The balance will be paid monthly with an interest payment to follow representing accrued interest at 15% per annum.

Plaintiff claims that the letters establish both the nature and exact amount of defendants' obligation, correctly noting that a letter can be considered an instrument for the payment of money only (see Blum, Gersen & Stream v 346 East 72nd Street Associates, Inc., 172 AD2d 444 [1st Dept 1991]). However, contrary to plaintiff's contention, the in-artfully drafted October 5th letter does not clearly state when payment is due; i.e., whether payment is due on March 5, 2007, as plaintiff contends, or whether payment is to be made at some other time (see Ian Woodner Family Collection, Inc. v Abaris Books, Ltd., 284 AD2d 163 [1st Dept 2001] [instrument was not one for the payment of money only because it did not specify the date by which payment had to be made]).¹ The April 16th letter, pursuant to which plaintiff bases his entitlement to interest, only raises more issues. It refers to an agreement to pay the balance owed on a monthly basis. Accordingly, an issue is raised as to whether plaintiff can still claim that the full amount

¹The October 5th letter indicates that the purchaser of the painting was to pay 1.3 million dollars "on or before March 5, 2007." If defendants received that payment from the buyer in October 2006, it is unclear whether plaintiff would still maintain that he was to be paid on March 5, 2007.

was due on March 5, 2007. Although the parties could have agreed to interest, it cannot be ascertained from the face of the October 5th letter. Such calculations require additional documentary proof or further explanation (see, HSBC Bank USA v IPO, LLC, 290 AD2d 246 [1st Dept 2002]), which may lead to McEnroe's success at trial. However, the motion for summary judgment in lieu of complaint must be denied.²

Accordingly, it is

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

ORDERED that plaintiff is directed to serve a complaint and defendants are directed to serve an answer within 20 days after service of the complaint.

This Constitutes the Decision and Order of the Court.

DATED: October 23, 2007

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
OCT 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

²The court notes that defendants' papers in opposition to plaintiff's motion raise two other defenses. However, defendants have not moved to dismiss on this basis. Therefore, defendants may raise any such objections, if appropriate, after such time as plaintiff serves a complaint.