

Krakowski v S&K Props. LLC

2008 NY Slip Op 30602(U)

February 26, 2008

Supreme Court, New York County

Docket Number: 0602532/2007

Judge: Richard B. Lowe

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

PRESENT: Justice

PART 56

Kikowski

INDEX NO. 602932/07

MOTION DATE 2/26/08

MOTION SEQ. NO. #002

MOTION CAL. NO. _____

- v -

Stk Properties LLC

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

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

MOTION IS DENIED WITH A DECLARATION

FILED
MAR 04 2008
NEW YORK COUNTY CLERK'S OFFICE

Dated: 2/26/08

RICHARD B. LOWE III J.S.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 56

-----x

ISRAEL KRAKOWSKI,

Plaintiff,

Index No: 602532/07

-against-

DECISION AND ORDER

S&K PROPERTIES LLC,

Defendant.

FILED
MAR 04 2008
NEW YORK
COUNTY CLERK'S OFFICE

RICHARD B. LOWE III, J:

This dispute arises out of the collection on two purported promissory notes executed by Defendant S&K Properties LLC ("S&K") in favor of Plaintiff Israel Krakowski ("Krakowski"). Krakowski moves pursuant to CPLR 3213 for summary judgment in lieu of complaint.

BACKGROUND

On July 27, 2001 and April 10, 2003, S&K executed two promissory notes in Krakowski's favor. The July 27, 2001 note was in the amount of \$250,000 with interest accruing at the rate of 11% per year. The April 10, 2003 note was in the amount of \$150,000 with interest also accruing at 11%. Both notes require payment in full upon demand.

On July 23, 2007, Krakowski demanded payment in full from George Serel, President of S&K. As of the date of this decision, Krakowski has not received payments for either note.

DISCUSSION

CPLR 3213, which allows actions based upon an instrument for the payment of money only to be commenced with a motion for summary judgment rather than a complaint, "provide[s]

a speedy and effective means” for resolving “presumptively meritorious” claims (*Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 154 [1975]). “A party utilizing this accelerated judgment procedure prevails ‘if, upon all the papers and proof submitted, the cause of action . . . shall be established sufficiently to warrant the court as a matter of law in directing judgment’ for the plaintiff” (*Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381, 383 [2004], quoting CPLR 3212 (b)). To defeat summary judgment the opponent must present evidentiary facts sufficient to raise a triable issue of fact, and averments merely stating conclusions, of fact or of law, are insufficient (*see Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]).

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 pay a sum certain, signed by the maker and due on demand or at a definite time (*Weissman v Sinorm Deli*, 88 NY2d 437, 443-44 [1996], citing 4 Weinstein-Korn-Miller, NY Civ Prac P 3213.04, at 253).

Here, the facts demonstrate the prototypical scenario described in *Weissman* and, therefore, Krakowski has sufficiently established entitlement to judgment as a matter of law (*see* CPLR 3212(b)).

S&K argues that Krakowski is not a true lender, but an equity holder in S&K, and, therefore, the purported notes constitute capital contributions to S&K (Serel Aff ¶ 3, 4, 6). However, as the exhibits attached to the Serel affidavit plainly demonstrate, the notion that Krakowski is a member of S&K is contradicted by the inclusion of Harry Krakowski (plaintiff’s son), rather than Plaintiff Israel Krakowski (*see* Serel Aff Exs B, D, E, F). Accordingly, S&K fails to defeat Krakowski’s motion for summary judgment in lieu of complaint.


CONCLUSION

Therefore, based on the foregoing, it is hereby

ORDERED that the motion is granted and the Clerk of the Court is directed to enter judgment in favor of Plaintiff Israel Krakowski and against defendant S&K Properties LLC in the amount of \$ ___, together with interest as prayed for allowable by law at the rate of ___% per annum from the date of _____, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: February 26, 2008

ENTER:



J.S.C.

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MAR 04 2008
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