

Pomerantz v Compulsion Sub, LLC

2008 NY Slip Op 30824(U)

March 18, 2008

Supreme Court, New York County

Docket Number: 0602162/2007

Judge: Emily Jane Goodman

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

PRESENT: Hon. EMILY JANE GOODMAN
Justice

PART 17

Rosenblatt, Ernest

INDEX NO.

602162/07

- v -

MOTION DATE

Compulsion SUB

MOTION SEQ. NO.

001

MOTION CAL. NO.

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 is decided for

A. F. Ades

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____

Dated: 3/18/08

FILED
MAR 24 2008
NEW YORK
COUNTY CLERK'S OFFICE

[Signature]

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
EMILY JANE GOODMAN

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

-----x
Ernest Pomerantz,

Plaintiff,

Index No. 602162/07

-against-

Compulsion Sub, LLC. and
Compulsion Inc.,

Defendants.

FILED
MAR 24 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Plaintiff moves, pursuant to CPLR 3213, for an order granting summary judgment in lieu of complaint against Defendants in the amount of \$50,000, plus interest. The motion is opposed by Defendant Compulsion Sub, LLC ("Sub"), but Compulsion Inc. has not opposed the motion and is in default. Sub maintains that the motion should be denied because it was purchased on some undisclosed date after the Loan Agreement and Promissory Note (both dated October 4, 2001) were executed, because the Loan Agreement provides for dispute resolution by arbitration, because no proof of the \$50,000 loan was submitted and because the Promissory Note is between only Plaintiff and Sub. In Reply, Plaintiff attaches an email with wiring instructions, a document apparently dated October 5, 2001, the source of which is unknown to the Court, and evidence that \$50,000 was withdrawn from Plaintiff's Merrill Lynch account

on October 5, 2001.

"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 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. Although Sub cannot raise the defenses of the other Defendant, the Court notes that Compulsion Inc. did not sign the Promissory Note. Rather it agreed to issue Warrants in the form attached as Exhibit B to the Loan Agreement (of which no exhibit was attached). Accordingly, Plaintiff has not

demonstrated that Compulsion Inc. made an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time. With respect to Sub, though Plaintiff may have been entitled to summary judgment, Sub is correct in maintaining that this dispute must be arbitrated. Although Sub did not agree to split any of the arbitrator's fees, which Plaintiff alleges caused the cancellation of the arbitration, the Loan Agreement appears to be silent as to payment of the arbitrator's fees.¹ Accordingly, Plaintiff should have either paid the arbitration fees (and sought to recoup them in the arbitration award)² and/or moved in court to compel arbitration.

Accordingly, it is

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

ORDERED that the action is dismissed in favor of arbitration; and it is further

ORDERED that the parties are directed to proceed to

¹However, the Loan Agreement provides that arbitration is to be conducted "in accordance with the then existing Rules of Practice and Procedure of JAMS or other mutually agreed upon arbitration firm." JAMS may or may not have a policy or procedure which requires that fees are split when the arbitration agreement is silent as to payment.

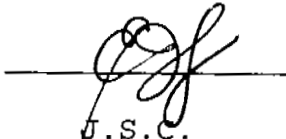
²The Loan Agreement provides that the arbitrator "shall determine which is the prevailing party and shall include in the award that party's reasonable attorneys' fees and cost."

arbitration, unless the dispute is settled prior to arbitration.

This Constitutes the Decision and Order of the Court.

DATED: March 18, 2008

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
MAR 24 2008
NEW YORK
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