

Regn v Village Frame & Art Shop LLC

2008 NY Slip Op 30943(U)

March 28, 2008

Supreme Court, New York County

Docket Number: 0115836/2007

Judge: Jane S. Solomon

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

PRESENT: Hon. JANE S. SOLOMON
Justice

PART 55

Index Number : 115836/2007
REGN, JOHANNES
VS.
VILLAGE FRAME & ART SHOP LLC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. 115836/2007
MOTION DATE 1-8-2008
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-5

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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.

FOR THE FOLLOWING REASON(S):

FILED
APR 01 2008
NEW YORK
COUNTY CLERKS OFFICE

Dated: 3/28/08



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

REFERENCE

THIS MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

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

-----X

JOHANNES REGN and HYOHEE REGN,

INDEX NO. 115836/2007

Plaintiff,

-against-

VILLAGE FRAME & ART SHOP LLC,
WILLIAM MARBIT, JOAN GREEN MARBIT
HENRY TRATTNER and PAMELA TRATTNER

DECISION and ORDER

Defendant.

FILED
APR 01 2008
NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.

In this action for the recovery of the money due on a Promissory Note, plaintiffs Johannes Regn and Hyohee Regn move under CPLR § 3213 for summary judgment in lieu of complaint against defendants Village Frame & Art Shop LLC ("Village Frame"), William Marbit, Joan Green Marbit, Henry Trattner and Pamela Trattner. Defendants have not appeared, and the motion is decided as follows.

On July 19, 2002, Village Frame and plaintiffs executed an agreement for Village Frame's purchase of plaintiffs' framing and art gallery business located in Manhattan. In connection with the sale, on October 18, 2002, William Marbit signed a Promissory Note on behalf of Village Frame, under which Village Frame promised to pay plaintiffs \$80,000, plus interest at two

percentage points above the Federal Reserve Discount Rate in effect on the payment date. Payments were to come in two equal installments due on October 21, 2003, and October 21, 2004. The Note also called for repayment of the entire outstanding principal should a default of either payment continue for more than 30 days after notice was given to Village Frame. The Note provides for the payment of attorneys fees, should an attorney be required for collection, and states that attorneys fees would be set at 10% of the amount then due. Interest on the Note after default was set to be incurred a rate of 10% per annum.

Also on October 18, 2002, all four of the individual defendants signed a Guaranty, guarantying Village Frame's obligations under the Promissory Note. The Guaranty does not contain a separate provision for attorneys fees.

On or about October 28, 2004, the parties executed a Settlement Agreement (a copy of which was not submitted with plaintiffs' motion papers), which modified the terms of the Promissory Note. Plaintiffs submit an Affidavit of Confession of Judgment signed by Henry Trattner and William Marbit in their individual capacities and on behalf of Village Frame. The Affidavit of Confession of Judgment purports to confess a judgment against all five defendants named herein, and authorizes the entry of a judgment against them in the sum of \$88,000.

Plaintiffs allege that defendants defaulted on their repayment obligations, and on February 9, 2007, plaintiffs' counsel sent all defendants a demand letter stating that plaintiffs were electing to accelerate the payments due, and that unless a check in the amount of \$50,500 plus interest at 6% per annum from May 1, 2006 was received, they would commence legal proceedings to collect the amount outstanding.

Plaintiffs contend that defendants have refused to fulfill their repayment obligations. An Affidavit from plaintiff Hyohee Regn states that there currently is an outstanding balance of \$44,252, together with interest from October 18, 2002. She states that this amount includes a principal of \$38,480 with interest from October 18, 2002, at the rate of 2% per annum above the Federal Reserve Discount Rate in effect on October 21, 2003 (i.e., the date payment of the principal was due), plus attorneys fees of \$5,772 representing 15% of this amount.

On or about November 28, 2007, plaintiffs commenced this action. The Summons with Notice states that the relief sought is \$61,367. The Notice of Motion states that a judgment is sought for "\$44,252.00 representing the unpaid balance due and owing to Plaintiffs on Promissory Notes, Guaranty & Confession of Judgment, together with interest thereon at the rate of Eight and 1/2 percent per annum from October 18, 2002, for a total sum due

and owing of \$63,059.00 and Attorneys Fees in the amount of \$6,305.00."

Affidavits of Service for each of the individual defendants state that the Summons and Notice of Motion for Summary Judgment in Lieu of Complaint were served by affixing copies of the same to their dwelling houses after due diligence was made to find a person of suitable age and discretion on three separate occasions. The Affidavits further state that an additional mailing of the documents was made by first class mail a few days later. No Affidavit of Service was submitted in relation to Village Frame.

Service on the individual defendants was properly made pursuant to CPLR § 308(4), commonly known as "nail and mail" service, and the action may continue against them. However, as there is no proof of service against Village Frame, the action must be dismissed as to it.

A guarantee of payment is an "instrument for the payment of money only" susceptible to a motion for summary judgment in lieu of complaint pursuant to CPLR § 3213. See Kornfeld v. NRX Technologies, Inc., 62 N.Y.2d 686 (1984). However, while plaintiffs are entitled to a judgment against the individual defendants under the Guaranty, the motion papers contain contradictory information about the amount now owed and

insufficient information about defendants' partial repayment. Therefore, the matter will be referred to a Special Referee to hear and report with recommendations.

Moreover, while the Guaranty obligates the individual defendants to pay plaintiffs' attorneys fees as required in the Promissory Note, the moving papers do not contain sufficient details about the hours billed or charges incurred in order to justify the 15% legal fee requested in Hyohee Regn's Affidavit, or the additional 10% on top of this amount requested in the Notice of Motion. Thus, the amount of reasonable attorneys fees must also be determined by the Special Referee.

Accordingly, it hereby is

ORDERED that upon searching the record, the claim against Village Frame & Art Shop, LLC is severed and dismissed and the Clerk of the Court is directed to enter judgment accordingly; and it further is

ORDERED that plaintiffs' motion for summary judgment in lieu of complaint is granted on default to the extent of holding the remaining defendants in default, and it is ordered that the issue of how much the individual defendants owe plaintiffs under the Guaranty for repayment of Village Frame's loan and for reasonable attorneys' fees, costs and expenses is referred to a

Special Referee to hear and report with recommendations; and it further is

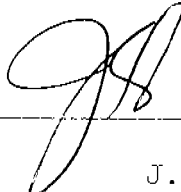
ORDERED that this motion shall be held in abeyance pending the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403; and it further is

ORDERED that a copy of this order with notice of entry shall be served by hand within 45 days of entry on the Motion Support Office (Room 119M) to arrange a date for the reference to a Special Referee; and it further is

ORDERED that if plaintiffs fail to comply with the immediately preceding paragraph, the action will be dismissed.

Dated: March 28, 2008

ENTER:



J.S.C.

JANE E. SULLIVAN

FILED
APR 01 2008
NEW YORK
COUNTY CLERK'S OFFICE