

International Money Mgrs., LLC. v Lucia

2008 NY Slip Op 31483(U)

May 16, 2008

Supreme Court, Nassau County

Docket Number: 4878-08/

Judge: Daniel R. Palmieri

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How

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

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**INTERNATIONAL MONEY MANAGERS, LLC.,
As assignee of Westrock Advisors, Inc.**

TRIAL TERM PART: 48

Plaintiff,

-against-

DARREN LUCIA,

Defendants.

INDEX NO.: 4878/08

**MOTION DATE: 4-14-08
SUBMIT DATE: 5-14-08
SEQ. NUMBER - 001**

**MOTION DATE: 4-30-08
SUBMIT DATE: 5-14-08
SEQ. NUMBER - 002**

-----x
The following papers have been read on this motion:

Summons and Amended Notice of Motion, dated 2-25-08.....1
Notice of Cross Motion, dated 4-4-08.....2
Affirmation in Opposition, dated 4-4-08.....3
Affidavit of Darren Lucia, dated 4-2-08.....4
**Affirmation in Reply to Motion and Opposition to Cross
Motion, dated 5-8-08.....5**
Reply Affidavit of Darren Lucia, dated 5-12-08.....6

Plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR §3213 is denied. Defendant's cross motions to dismiss pursuant to CPLR §3211(a)(7) and CPLR §7503, failure to state a cause of action and to compel arbitration are granted and this action is dismissed, all other requests for relief are denied.

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Plaintiff, assignee of a former employer of defendant moves pursuant to CPLR §3213 for summary judgment in lieu of complaint, alleging through its attorney that defendant, as an employee of Westrock Advisors, Inc., became indebted to Westrock by reason of loans to defendant by Westrock. The notice of motion seeks \$43,500.00. The attorney's affirmation refers to the sum of \$28,000.00 and the supporting affidavit of an employee of Westrock seeks \$18,000.00. Although described, neither the checks to defendant, an employment agreement nor any instrument for the payment of money are attached to the moving papers. In reply, plaintiff submits four checks payable to defendant noted to be "Advance" on two without any notations on the other two and a blank unsigned (by any party) undated "Employment Agreement" containing an intricate formula describing loans to defendant and variations on repayment linked to advances of expenses, job performance and parameters of time of employment. Interestingly, the unauthenticated Employment Agreement contains a provision requiring that any claim or controversy shall be settled pursuant to NASD (now FINRA) arbitration. Also by way of reply, plaintiff's counsel opts to select the sum of \$28,000.00 as the amount sought by plaintiff.

Defendant's cross motion to compel arbitration argues that since Westrock is a FINRA member and defendant is an associated person registered with FINRA, this dispute must be resolved pursuant to FINRA rules of arbitration (a copy of which is attached). FINRA Rule 13200 provides in substance that disputes between members and associated persons arising out of their business activities, must be submitted to arbitration and rule 13209 prohibits a party from bringing an action while an arbitration is pending.

Here, Westrock did initiate and then withdraw an arbitration of this same claim and although an assignment of the Westrock claim to plaintiff is alleged, no assignment has been submitted. In any event, plaintiff, as assignee, can obtain no greater rights as to defendant than can its assignor Westrock. *See Spray Holdings, Ltd v. Financial Group, Inc.*, 269 F. Supp 2d 356 (SDNY 2003); *GMAC Commercial Credit LLC v. Springs Industries, Inc.*, 171 F. Supp. 2d 209 (SDNY 2001).

Finally, except for the endorsements on the four checks claimed to be representing a loan, plaintiff has not submitted any writing that contains the signature of defendant

On a motion for summary judgment, the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law (*see Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986), *Rebecchi v. Whitmore*, 172 AD2d 600, (2nd Dept. 1991). “The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” (*Frank Corp. v. Federal Ins. Co.*, *supra* at 967; *GTF Mktg. V. Colonial Aluminum Sales*, 66 NY2d 965 (1985), *Rebecchi v. Whitmore, supra* at 601.

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court deciding this type of motion is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist (*see Barr v. County of Albany*, 50 NY2d 247 (1980); *Daliendo v. Johnson*, 147 AD2d 312, 317 (2nd Dept. 1989)].

In addition to the foregoing CPLR §3213 requires that a summary judgment motion may be combined with a summons “When an action is based upon an instrument for the payment of money only”

Plaintiff has failed to establish a prima facie showing of entitlement to summary judgment. Plaintiff’s motion is supported by an affirmation of his attorney who does not profess any personal knowledge. An attorney’s affirmation that is not based upon personal knowledge is of no probative or evidentiary significance, hence, plaintiff has failed to establish his prima facie entitlement to summary judgment, the burden of coming forward has not shifted to the defendant and the motion should be denied without regard to the sufficiency of defendant’s papers. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 55 (2d Dept. 2006). Moreover there has been no authentication of the documents annexed to the moving papers by any person with personal knowledge. *Sampson v. Delaney*, 34 AD3d 349 (1st Dept. 2006); *Stahl v. Stralberg*, 287 AD2d 613 (2d Dept. 2001). This deficiency is not cured by the conclusory affidavit of Sharma which is based entirely on unattached and unauthenticated records and notwithstanding defendant’s concession that he received the four checks relied upon, as noted above the reply submission does not resolve this infirmity.

Plaintiff’s motion also fails to satisfy CPLR §3213 since it is not based on an instrument for the payment of money only.

CPLR §3213 allows a plaintiff to commence an action “based upon an instrument for the payment of money only” by serving a summons and notice of motion for summary judgment and supporting papers in lieu of a complaint. A document comes within CPLR §3213 if a prima facie case would be made out by the instrument and a failure to make the payments called for by its

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terms. The 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. Where the instrument requires something in addition to the defendant's explicit promise to pay a sum of money CPLR §3213 is unavailable. *Chiarella v. Chiarella*, 16 Misc. 3d 575 (Sup. Ct. Queens Cty. 2007) citations omitted.

Where outside proof is necessary to make out a prima facie case, a document fails to meet the requirement that it be deemed an instrument for the payment of money only. *Stallone v. Rostek*, 27 AD3d 449 (2d Dept. 2006); *Kerin v. Kaufman*, 296 AD2d 336 (1st Dept. 2002); *Beal Bank v. Melville Magnetic Resonance Imaging, P.C.*, 270 AD2d 440 (2d Dept. 2000).

Here, the Employment Agreement (even assuming it was signed) which forms the basis for this action is not an agreement to pay a sum of money only. The Employment Agreement contains provision linking loans to job performance and time intervals but also contains provisions giving Westrock the discretionary right to advance employee expenses. Based on the submissions made, there is no way for this Court to calculate what amount if any is due to plaintiff and for what purpose. Finally, although the Sharma affidavit states that defendant did not remain employed for 2 ½ years as required the Employment Agreement does not support that contention and plaintiff has not explained why his moving affidavit on this issue refers to a person named DENARO and not to defendant. The extrinsic terms upon which payment was conditioned are more than *de minimus* or routine items that may be readily calculated.

Defendant's cross motion to dismiss for failure to state a cause of action and to compel arbitration is granted. Although CPLR §3213 permits the Court, upon a denial of

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summary judgment, to permit the moving and answering papers to be deemed the complaint and answer respectively, that provision should not immunize the pleading from scrutiny under the rubric of a motion to dismiss pursuant to CPLR §3211 (a)(7), failure to state a cause of action or CPLR §7503, to compel arbitration. As defendant's cross motion is made pursuant to CPLR 3211(a)(7) prior to answer, the Court must look within the four corners of the complaint, and if any cause of action is discernable therefrom the motion should fail. *See, e.g., Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). In making this determination, the factual allegations asserted in the pleading are to be accepted as true, and the plaintiff is to be accorded the benefit of every favorable inference that may be drawn therefrom. *Leon v Martinez*, 84 NY2d 83 (1994); *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 (2d Dept. 2004). Applying these well-established standards to the complaint in this action (even if considering the reply submission), it is apparent that a cause of action is not made out against the defendant. Scrutinizing the claims made by plaintiff as the Court must do and accepting for pleading purposes the facts alleged in the moving and reply papers, there is no showing that plaintiff's assignor Westrock made a loan to defendant that has not been repaid.

Defendant however has established that even in the absence of a written employment arrangement, the parties have by their participation in the securities industry agreed that this dispute must be resolved by means of FINRA arbitration and plaintiff as assignee of Westrock may not avoid or circumvent this obligation. *Cantor Fitzgerald Partners v. Municipal Partners LLC.*, 11 AD3d 247 (1st Dept. 2004).

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Based on the foregoing, the action is dismissed and the cross motion to compel arbitration is granted.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: May 16, 2008



HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE