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

PRESENT: HON. PAUL G. FEINMAN PART 12

Justice

Index Number : 104452/2008
TONCHE, CARLOS JR.
VS.
COHEN, EWA J.
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT IN LIEU OF COMPLAINT

INDEX NO. 104452-08
MOTION DATE 10/14/08
MOTION SEQ. NO. #001
MOTION CAL. NO. 12

read on this motion to/for _____

	PAPERS NUMBERED
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

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED
NOV 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/31/08

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12
----------X
CARLOS TONCHE, JR., as Attorney-in-Fact for MILAN GERNAT,

Plaintiff,

against

EWA J. COHEN AND LARRY COHEN,

Defendants.
----------X

Index Number	104452/2008
Mot. Seq. No.	001
Cal. No.	12
Submission Date	Oct. , 2008

DECISION AND ORDER

For Plaintiff:
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For Defendants:
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Papers considered in review of this motion for summary judgment in lieu of complaint:

Papers	Numbered
Plaintiff's Notice of Motion & Annexed Exhibits	1
Affidavit of Service	2
Defendants' Answering Affirmation & Annexed Exhibits	3
Plaintiff's Reply Affirmation	4

PAUL G. FEINMAN, J.:

Plaintiff moves the court pursuant to CPLR 3213 for summary judgment in lieu of complaint in this action to recover on a promissory note upon which defendants allegedly defaulted. Defendants oppose the motion, primarily arguing that there is a lack of consideration for the promissory note. For the reasons which follow, plaintiff's motion is granted.

Background

On or about December 29, 2004,[1] Ewa Cohen and Larry Cohen (hereinafter "defendants") as borrowers, executed a promissory note with Carlos Tonche, Jr. for the principal sum of $118,000 with an interest rate of seven percent (7%) per annum on the unpaid balance (Pl. Affm.

[1] The promissory note is undated, but it was notarized on December 29, 2004. According to plaintiff, this was also the date of the execution of the promissory note (Tonche Aff. ¶ 2).

in Supp. of Motion [hereinafter "Misk Aff."] ¶ 4). Under the terms of the promissory note, defendants were required to make sixty (60) monthly payments of $2,336.54 commencing in November of 2004 and ending in October 2009 (Misk Aff. ¶ 4, Ex. A). The promissory note also contains a provision for late payment charges of ten percent (10%) or $233.37 per month where payment is not made within five (5) days of the due date, plus reasonable attorneys' fees (Misk Aff. ¶ 4, Ex. A). In addition, the promissory note contains a clause stating that, at the option of any holder of the note, the note shall be made immediately payable where the borrower fails to make payment within thirteen (13) days of the due date (Misk Aff., Ex. A). According to plaintiff, defendants made twenty-five (25) payments on the note, from November 2004 to December 2006, but defaulted on the January 2007 payment, and have not made any further payments (Misk Aff. ¶ 4).

Plaintiff now brings this motion for summary judgment in lieu of complaint[2] to recover the outstanding balance on the promissory note in the amount of $73,777.19 (Misk Aff. ¶ 6). Plaintiff provides an amortization schedule showing the outstanding balance based on the length of the loan and the interest rate, and calculates the accrued interest on the loan to be $8,167.95 (Misk Aff. ¶ 7, Ex. D). Plaintiff also seeks to recover reasonable attorney's fees incurred in the enforcement of the note (Misk Aff. ¶ 7).

In opposition to the motion, defendants argue that "the major factual issue that precludes the granting of summary judgment" is the lack of consideration for the note (Answering Affm. ¶ 8). Defendants also argue that there are other evidentiary problems with plaintiff's proof which

[2] Plaintiff Carlos Tonche, Jr. initially brought an action to recover on this promissory note by filing a verified complaint (Index No. 108468/2007) in or about June 2007 (Answering Aff. ¶ 3, Ex. A). However, in March 2008, plaintiff discontinued that action based on his transfer of the note to Milan Gernat, and filed the instant action as attorney-in-fact to Gernat (Answering Aff. ¶ 4, Ex. E).

stand as "significant obstacles to granting the motion," including the execution of plaintiff's affidavit in the State of New Jersey (Answering Affm. ¶¶ 8, 9). Defendants also contend that the Power of Attorney on which Tonche, Jr. relies to gain standing to sue defendants is not admissible evidence in this case under CPLR § 2309 (Answering Aff. ¶ 10).

In reply, plaintiff contends that there is no dispute that the "General Power of Attorney" is authentic and confers upon Tonche, Jr. the power to bring this type of lawsuit on behalf of Gernat (Reply Affm. ¶ 6). By loan transfer agreement dated April 29, 2006 Carlos Tonche, Jr. transferred the loan at issue to Milan Gernat, and Gernat agreed to "assume payments from Ms. Cohen for the outstanding loan" (Misk. Aff. ¶ 5, Ex. C). On October 19, 2006, Gernat signed a "General Power of Attorney," which grants to Tonche, Jr., as Attorney-in-Fact:

> Full power and authority to do and perform all and every act and thing whatsoever requisite, necessary and proper to be done in the exercise of any of the rights and powers herein granted as to all intents and purposes as [Gernat] might or could do .... [including the power] ... to ask, demand, sue for, cover collect, receive, and hold and possess all such sums of money...personal and real property, intangible and tangible property and property rights and demands whatsoever, liquidated or unliquidated, as are now, or shall hereafter become owed by, or due, owing, payable or belonging to [Gernat].

(Misk. Aff. ¶ 5, Ex. B).

According to plaintiff, "the issue of the authenticity of this Power of Attorney has already been decided by a Court of competent jurisdiction in a related matter" (*Matter of Carlos Tonche, Jr., as Attorney-in-Fact for Milan Gernat v Original Christine's Restaurant, Inc.*, Index No. 602217/2007) (Reply Affm. ¶¶ 7, 8, Ex. B).

Plaintiff also contends that defendants' argument that the promissory note cannot be enforced because of an absence of consideration contradicts the plain language of the note, which states unequivocally "FOR VALUE RECEIVED, the undersigned hereby jointly and severally promise to pay to the order of Carlos Tonche, Jr. ..." (Reply Affm. ¶ 9). Thus, plaintiff argues that

defendants' assertion is "nothing more than an attempt to further delay the repayment of the outstanding portion of this promissory note" (Reply Affm. ¶ 9).

Discussion

Under New York law, "[w]hen 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" (CPLR § 3213). CPLR § 3213 is intended to provide a "speedy and effective means" for resolving "presumptively meritorious claims" (*Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381, 383 [2004], quoting *Interman Industrial Products, Ltd. v R. S. M. Electron Power, Inc.*, 37 NY2d 151, 154 [1975]; *see also*, *Holmes v Allstate Ins. Co.* 33 AD2d 96, 98-99 [1st Dept. 1969]). Thus, a document comes within CPLR § 3213 only "if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms"(*Interman,* 37 NY2d at 155). However, "the instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimus deviation from the face of the document" (*Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996], quoting *Bank Leumi Trust Co. v Rattet & Liebman*, 182 AD2d 541, 542 [1st Dept. 1992]). Where a prima facie case is shown, the moving party would be entitled to summary judgment unless the opposing party comes forward with "evidentiary proof sufficient to raise an issue as to the defenses to the instrument" (*Interman*, 37 NY2d at 155).

Here, defendants first raise the issue of standing as a defense in this action and challenge the validity of Tonche's "General Power of Attorney." Plaintiff argues, and the record confirms, that the issue of the validity of the "General Power of Attorney" in this case has been previously determined by a court of competent jurisdiction. *See Matter of Carlos Tonche, Jr., as Attorney-in-Fact for Milan Gernat v Original Christine's Restaurant, Inc.*, Index No. 602217/2007 (Sup. Ct.

NY Co., Kornreich, J. 2008). That court of co-ordinate jurisdiction stated that "due to the 'General Power of Attorney' executed by Gernat, [Tonche] clearly has standing to bring this petition on Gernat's behalf." However, the court is not collaterally estopped from re-considering the issue because there is not an identity of parties in the two actions. That said, the court finds the decision in that action to be persuasive, albeit not controlling, authority.

Aside from certain technical errors raised by defendants regarding the typographical errors and CPLR 2309,[3] since addressed in reply, defendants only real opposition to the promissory note is based on the purported lack of consideration in the note. The plain language of the promissory note at issue establishes as a matter of law defendant's absolute, unconditional obligation to pay the sum of $2,336.54 per month plus ten percent interest, i.e., $233.37, for each month that payment is not made within five days of the due date. The court notes that defendants have produced no evidence to substantiate their allegation that there was a lack of consideration for the note or to defeat plaintiff's motion by rebutting the conclusion that they did not default in payment. Rather, the evidence of record indicates that defendants' allegation of lack of consideration lacks veracity. Defendants very own signature on a note containing the terms "for value received" contradicts their assertion (*see e.g.*, *Crumbliss v Swerdlow*, 158 AD2d 502 [2d Dept. 1990]) *app den.* 75 NY2d 710 [1990] [finding summary judgment in lieu of complaint proper where use of the term "for the value received" in the promissory note indicated that there was consideration for the note, despite defendants unsubstantiated assertion that the note is

[3] Plaintiff has corrected the errors made in his earlier papers and provides an affidavit that has been executed in New York for the court's consideration as having been filed *nunc pro tunc* (Reply Affm. ¶ 5). Further, the court notes that plaintiffs mislabeling of the motion as one for summary judgment pursuant to CPLR § 3212 was of no moment "since errors of such type are to be disregarded" (*see Technical Tape, Inc. v Spray-Tuck, Inc.* 146 AD2d 517, 536 [1st Dept. 1989], *app dismd without op.* 74 NY2d 791 [1989]).

unenforceable due to lack of consideration]).

Further, the court notes that, for more than two years after executing the note, defendants made regular monthly payment on the note (having made a total of twenty-five (25) payments) that they now claim lacks consideration. Thus, their conclusory contention cannot stand as a bar to plaintiff's claim (*see e.g., TPZ Corp. v Rigakos*, 226 AD2d 445 [2d Dept. 1996], *app den.* 89 NY2d 807 1997] ["defendants' unsubstantiated, conclusory allegations of lack of consideration ... were insufficient to defeat the plaintiff's motion for summary judgment in lieu of complaint" in an action to recover on two promissory notes]). In the absence of any evidentiary proof sufficient to raise an issue as to the defenses to the promissory note, plaintiff is entitled to summary judgment in lieu of complaint (*see e.g., Alard, L.L.C. v Weiss*, 1 AD3d 131, 131 [1st Dept. 2003] [having established defendant's execution of the note and default in payment, plaintiff made out a prima facie case for summary judgment in lieu of complaint]). It is therefore

ORDERED that the plaintiff's motion for summary judgment pursuant to CPLR 3213 is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants Ewa Cohen and Larry Cohen in the amount of $73,777.19 plus interest of $8,167.95 for a total of $81,945.14, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court.

Dated: October 31, 2008
New York, New York

J.S.C.

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