

Swig Equities, LLC v Gindi

2009 NY Slip Op 31518(U)

July 9, 2009

Supreme Court, New York County

Docket Number: 104522/2009

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 12

Index Number : 104522/2009

SWIG EQUITIES LLC

vs

GINDI, RALPH

Sequence Number : 001

SUMMARY JUDGEMENT LIEU COMPLAINT

INDEX NO. 104522/2009
MOTION DATE 5/7/09
MOTION SEQ. NO. 001
MOTION CAL. NO. 104
SJLC

_____ motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

13

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

JUL 13 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/9/09

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

SWIG EQUITIES, LLC,
Plaintiff,

against

RALPH GINDI,
Defendant.

Index Number 104522/2009
Submission Date May 7, 2009
Mot. Seq. No. 001
Cal. No. 104

DECISION AND ORDER

-----X

For the Plaintiff:
Stempel Bennett Claman and Hochberg, P.C.
By: Edmond P. O'Brien, Esq.
675 Third Avenue
New York, New York 10017
(212) 681-6500

For the Defendant:
no appearance

FILED
JUL 13 2009
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NEW YORK

Papers considered in review of this motion for summary judgment :

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Affidavit of Attempted Service	2
Amended Affidavit of Attempted Service	3

PAUL G. FEINMAN, J.:

Plaintiff moves for summary judgment in lieu of complaint against Ralph Gindi, pursuant to CPLR 3213, based upon defendant's failure to repay the monies loaned to him by plaintiff pursuant to a promissory note dated July 17, 2008 (Ex. A). For the reasons stated below, although unopposed, the motion is denied.

This is an action seeking recovery of the principal amount loaned of \$303,177.52, plus interest and default interest as set forth in the note (Ex. A., Note ¶¶ 2, 6[A]), along with attorney's fees, costs, and disbursements (Ex. A., Note ¶ 6[E]). The affidavit by plaintiff's

president in support of the motion claims that, despite demand for payment, defendant Gindi failed to make any payment on the note as of March 31, 2009 (Swig Aff. ¶ 7).

According to the Amended Affidavit of Service sworn to on April 14, 2009, process server Hector Figueroa attempted to serve the summons, notice of motion, and request for judicial intervention upon defendant on April 2, 2009, April 3, 2009, and finally on April 7, 2009. (Amended Aff. of Serv.). On the third and final attempt, Figueroa claims to have personally delivered the papers to the receptionist at Besen & Associates at the defendant's Park Avenue address. (*Id.*). One day later, April 8, 2009, Figueroa purports to have mailed a copy of the summons, notice of motion, and request for judicial intervention to defendant at the address listed in the Demand Note. (Amended Aff. of Serv. Ex. A ¶ 7). In its Notice of Motion for Summary Judgment in Lieu of Complaint, plaintiff requests a return date of April 30, 2009. (Notice of Mot.). Furthermore, plaintiff demands that defendant serve answering papers, if at all, on or before April 24, 2009. (*Id.* at 3).

In an action pursuant to CPLR 3213, the court may enter summary judgment in favor of the plaintiff if the instrument upon which the action is based is for "the payment of money only." (CPLR 3213). Service of the summons and motion under CPLR 3213 requires the defendant to submit answering papers within the time provided in the notice of motion, and "the minimum amount of time the plaintiff must give the defendant to appear and oppose the motion is dependent upon the date and method of service" which is calculated pursuant to CPLR 320 (*Goldstein v Saltzman*, 13 Misc 3d 1023, 1025 [Sup. Ct. Nassau County 2006]). Under CPLR 320 (a), unless the service is made in person, the defendant shall appear within 30 days after service is complete. Under CPLR 3213, a plaintiff may set the hearing date of the motion later

than the minimum time and then require a copy of the answering papers served within the extended time frame, not exceeding 10 days before the hearing date. Since service is not complete until ten days after proof of service is filed with the clerk of the court (CPLR 308[2]), “the minimum amount of time between service of the summons and motion papers and the return date is 40 days.” (*Goldstein v Saltzman*, 13 Misc 3d at 1025, n. 1).


Here, plaintiff served the summons and notice of motion on April 8, 2009 but requested a return date just 22 days later, on April 30, 2009. Since service was made to a person of suitable age and discretion pursuant to CPLR 308(2), under CPLR 3213 service was not complete until 40 days after April 8, that is, on May 18. Furthermore, since plaintiff requested that defendant serve any answering papers six days before the proposed return date, the time allotted for defendant to answer must be extended by an additional six days. (See, *Goldstein v Saltzman*, 13 Misc 3d at 1026, n 3). In sum, the return date should not have been noticed sooner than May 24, 2009..

Particularly when a defendant fails to appear, the failure to give proper notice of a motion deprives the court of jurisdiction to hear the motion (see *Goldstein v Saltzman*, 13 Misc 3d at 1027, citations omitted). When a defendant has not been provided with the statutorily required time in which to answer a motion made pursuant to CPLR 3213, the court lacks jurisdiction to hear the motion and it must be denied without prejudice and the action dismissed. (*Goldstein v Saltzman*, 13 Misc 3d at 1027, citing *National Bank of Canada v Skydell*, 181 AD2d 645 [1st Dept 1992] [holding it proper to deny plaintiff’s motion summary judgment pursuant to CPLR 3213 when it allotted insufficient time for defendants to respond to the notice of motion]). Here, because plaintiff failed to provide proper notice, and the proposed return date does not provide

the defendant with the statutorily mandated time under CPLR 3213 in which to answer, the motion against Ralph Gindi must be denied and the proceeding dismissed without prejudice. It is

ORDERED that the motion for summary judgment in lieu of complaint (CPLR 3213) is denied and the proceeding dismissed without prejudice.

Dated: *July 9, 2009*
New York/New York



J.S.C.

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JUL 13 2009
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