

**Gullery v Imburgio**

2009 NY Slip Op 31681(U)

July 23, 2009

Supreme Court, Richmond County

Docket Number: 105033/08

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No. 105033/08  
Motion No.:001**

**ROBERT GULLERY,**

*Plaintiff*

*against*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**STEVEN J. IMBURGIO,**

*Defendant*

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The following items were considered in the review of the following motion for summary judgment in lieu of a complaint.

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion and Affidavits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Defendant's Supplemental Affidavit</b>	<b>3</b>
<b>Replying Affidavits</b>	<b>4</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff moves this court for an order granting summary judgment in lieu of a complaint pursuant to *CPLR* § 3213 to recover the sum of one \$100,000 from the defendant pursuant to a promissory note. The plaintiff's motion is granted in its entirety.

**Facts**

This action arises out of a promissory note between the parties which was executed May 9, 2008. The note did not include a due date for payment and was signed by the defendant d/b/a Wheel Concept 3. The plaintiff alleges that the sum of \$100,000 was lent to the defendant to open an additional business store (Wheel Concepts 3). He claims that the defendant has failed to repay the funds which were loaned him despite due demand and requests payment in full along with interest from November 3, 2008. Lastly, the plaintiff claims that defendant has offered

instruments that were subsequently returned due to insufficient funds. The plaintiff provides a total of five checks all of which were returned for insufficient funds. Only one check, however, is dated after the execution of the note.

The note reads “Steven J. Imburgio d/b/a Wheel Concept 3 promises to pay unto Robert Gullery the sum of one hundred thousand dollars.” Neither party disputes the signature is the defendants. The defendant claims however, that he signed under the belief that the maker of the note would be Wheel Concept 3 a Delaware limited liability corporation, and not himself. He states in his affidavit in opposition:

“The reason I signed the note was because plaintiff’s corporation (Wheel Concepts) provided certain goods to Wheel Concept 3. When plaintiff asked for security in the form of the note, he asked me to make it out to him personally instead of his company. I did so at Mr. Gullery’s request in my capacity as owner of Wheel Concept 3.”

The defendant alleges that no funds were ever lent to him or Wheel Concepts 3 by the plaintiff. Rather, he states that the plaintiff’s corporation provided his corporation with goods which totaled \$60,000. He claims to have signed the note out of the request and for the convenience of the plaintiff who was to supply an additional \$40,000 worth of goods which ultimately were never supplied. Moreover, the defendant claims he is owed \$8,000 for goods he provided to the plaintiff. Lastly, the defendant alleges that payment was never demanded and he did not suspect payment was due until the instant motion was made on December 17, 2008.

### **Discussion**

Plaintiff, Robert Gullery, seeks summary judgment in lieu of a complaint under *CPLR* § 3213 which states in pertinent part:

“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...If the motion is denied, the

moving and answering papers shall be deemed the complaint and answer, respectively unless the court orders otherwise.”

The *New York Uniform Commercial Code (NY UCC)* section 9-102 (65) defines a promissory note as “an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.” Here the note does evidence a promise to pay. Therefore, this promissory note is a contract to pay.

### **Execution of the Note**

The defendant claims to have signed the note d/b/a the Delaware limited liability company, Wheel Concepts 3 in the capacity of its owner. The defendant claims that the note was written for payment for goods received as well as goods the plaintiff was to provide. This was a business transaction between Wheel Concepts 3 and the plaintiff’s company, Wheel Concepts. The defendant’s signing d/b/a results in the transaction being governed by *New York’s General Business Law (NY GBL)*. *General Business Law* § 130, which states in pertinent part

“No person shall hereafter (1) carry on or conduct or transact business in this state under any name or designation other than his or its real name...unless,; (b) such person, if a corporation, limited partnership or limited liability company, shall file together with the fees as set forth in subdivision five of this section, in the office of the secretary of the state a certificate setting forth the name or designation under which business is carried on or conducted or transacted, its corporate, limited partnership or limited liability company name, the location including number and street, if any, of its principle place of business in the state, the name of each county in which it does business or intends to do business, and the location including number and street, if any, of each place where it carries on or conducts or transacts business in this state.”

The defendant has submitted no documentation that he has complied with the *NY GBL* § 130 although he claims the note was executed as a result of a business transaction for goods. In failing to comply with *NY GBL* §130 the defendant is not authorized to sign d/b/a

when signing the note. Consequently, the defendant is solely responsible for payment on the note.

### **Due Demand**

The defendant claims that he was unaware that payment was due until the instant claim was filed. Moreover, here the note did not specify a time for performance. However, “a contract is not unenforceable merely because it does not set forth a time for performance.”<sup>1</sup> Rather, The New York Court of Appeals has held:

“when a contract does not specify time for performance, the law implies a reasonable time. What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case.”<sup>2</sup>

The *New York Uniform Commercial Code* § 3-108 states in pertinent part: “a promise or order is payable on demand if it...does not state any time for payment.” Article 3 of the *UCC* defines promise as “a written undertaking to pay money signed by the person undertaking to pay.” Here, the note is a written undertaking to pay that the defendant signed and because there is no stated time for payment it is payable upon the plaintiff’s demand. In concurrence, the Appellate Division, First Department has held that the “fact that promissory notes were undated did not invalidate them, but rather made them payable on demand.”<sup>3</sup>

Moreover, the plaintiff has provided several checks which were returned for insufficient funds executed by the defendant to the plaintiff. While only one check (dated November 3, 2008) was executed subsequent to the note, it was written for the sum of \$17,500 approximately

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<sup>1</sup> Banks, *New York Contract Law* §16:2, at 585 [28 West’s NY Prac Series 2006].

<sup>2</sup> *Savasta v. 470 Newport Assocs.* 82 NY2d 763 [1993].

<sup>3</sup> *Nuri Farhadi v. Anavian*, 58 Ad2d 546 [1st Dept 1977].

four months after the note was signed. When checks have been executed by the defendant and delivered to the plaintiff in cases such as this the checks may show evidence of the defendant acknowledging the loan. The Appellate Division, Second Department has found “the plaintiff submitted canceled checks evidencing that a loan was made.”<sup>4</sup>

### Conclusion

“Basic summary judgment principles have long held that it is the movant’s burden to present evidence demonstrating his or her prima facie entitlement to judgment as a matter of law.”<sup>5</sup> Where the plaintiff has shown that the defendant is responsible for payment under the note and due demand for performance was made prior to filing a motion for summary judgment in lieu of a complaint under *CPLR* § 3213 no issue of fact exists and the plaintiff is entitled to summary judgment.

Accordingly, it is hereby:

ORDERED, that Robert Gullery’s motion for summary judgment is granted in its entirety, and it is further

ORDERED, that Robert Gullery is entitled to a monetary judgment against Steven J. Imburgio in the sum of \$100,000 plus interest, costs and disbursements.

ENTER,

DATED: July 23, 2008

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<sup>4</sup>*Layden v. Boccio*, 253 AD2d 540 [2d Dept 1998].

<sup>5</sup>*See, Zecca v. Riccardelli*, 293 Ad2d 31 [2d Dept 2002].

Joseph J. Maltese  
Justice of the Supreme Court