

Fayenson v Freidman
2010 NY Slip Op 30726(U)
April 5, 2010
Supreme Court, New York County
Docket Number: 601196/2009
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JACOB FAYENSON,

Plaintiff,

- against-

EVGENY FREIDMAN,

Defendant.

INDEX NO. 601196/2009

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 3, were read on this motion by plaintiff for summary judgment.

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

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

FILED

APR 02 2010

NEW YORK
COUNTY CLERK'S OFFICE

PAPERS NUMBERED

1 _____

2 _____

3 _____

Cross-Motion: Yes No

Plaintiff Jacob Fayenson ("plaintiff") brings this action to recover sums allegedly owed by defendant Evgeny Freidman ("defendant") under two promissory notes that were executed in connection with a purchase of plaintiff's interest in a corporation. Plaintiff alleges in the amended verified complaint that defendant defaulted under the promissory notes by failing to make installment payments. Defendant has not answered or raised any affirmative defenses. Plaintiff now moves for summary judgment, pursuant to CPLR 3212, awarding judgment against defendant in the sum of \$102,527.96, plus statutory interest and attorney's fees. Defendant has responded in opposition to the motion, and plaintiff has filed a reply.

BACKGROUND

In support of his motion for summary judgment, plaintiff submits, *inter alia*, his own affidavit; the two promissory notes; the underlying stock purchase agreement; a demand letter dated March 4, 2009; copies of checks payable to plaintiff, a bank deposit slip and receipts; a

schedule of payments allegedly made and owed to plaintiff from defendant; an affirmation of plaintiff's attorney Alan Katz, Esq.; the amended verified complaint; and a memorandum of law. In opposition to the motion, defendant submits his own affidavit and the summons and verified complaint with exhibits. The following facts are undisputed.

Plaintiff is the holder of two promissory notes dated February 1, 1999, that were executed as part of a no down-payment purchase by defendant of plaintiff's interest in Woodside Management Inc., a New York corporation. One of the notes is in the amount of \$850,000, and the other \$325,000. Both notes were payable to plaintiff with interest of 10% per annum.

In accordance with the terms of the notes, which are identical, a payment of principal and interest became due and payable to plaintiff, on each note, on the last business day of every month, or within a five calendar day grace period, payable in 120 consecutive equal installments commencing on February 26, 1999. The notes were subject to acceleration in the event of default, with an interest rate of 12% on any principal or interest payment that became an amount past due. The notes also provided for an award of attorney's fees in the event of default, providing:

"In case any principal of or interest on this Note is not paid when due, Maker shall be liable for all costs of enforcement and collection of this Note incurred by Payee or any other Payee of this Note, including but not limited to reasonable attorney's fees, disbursements and court costs. In addition, in the Event of a Default hereunder, Maker shall pay all reasonable attorney's fees and disbursements incurred by Payee in obtaining advice as to its rights and remedies in connection with such default."

In his affidavit, plaintiff alleges that commencing on May 1, 1999, and continuing to date, defendant has failed to pay the full amount of principal and interest due under each note. He claims that the last check he received from defendant was for November 2008, and that defendant has failed to make any payments since with respect to either principal or interest

due. Plaintiff claims that he has tried to collect the full amount due from defendant but was unable to, and that he never agreed to any kind of accord and satisfaction.

On March 4, 2009, plaintiff delivered to defendant via certified mail a demand for payment of the entire sums outstanding, representing the unpaid principal, interest, penalties and shortfalls in payments due under both notes. Plaintiff also put defendant on notice that all obligations under the notes were being accelerated and were due and payable within five business days of March 4, 2009, with applicable interest and costs. Plaintiff claims that defendant did not make any payments pursuant to the demand, causing him to incur attorney's fees and disbursements in connection with the claim. He submits documentation purportedly evidencing all payments received from defendant prior to the declaration of default, including a schedule of payments wherein he claims that as of October 30, 2009, he is owed \$120,263.37, consisting of the shortfall in principal and interest payments and installment penalties. He also requests statutory pre-judgment interest plus the per diem rate until entry of judgment, and attorney's fees.

In his affidavit, defendant alleges that plaintiff's schedule of payments is inaccurate because it indicates that payments began in May 1999, whereas he actually began making payments in February 1999. He also asserts that the schedule fails to account for payments made in February 1999, March 1999 and April 1999. He claims that an alleged shortfall of \$16,421.68 for 1999 is thus inaccurate as are all interest calculations carried forward from that year.

In his reply affidavit, plaintiff argues that defendant's contentions are unsupported but he accepts, for purposes of eliminating an issue of fact with respect to this motion, defendant's claims regarding payments made during 1999 and crediting thereof for that year. He attaches a revised schedule of payments and requests: (a) summary judgment awarding the sum of \$102,527.96, consisting of \$87,167.20, representing the shortfall in principal payments;

\$13,860.76, representing agreed-upon interest payments; and \$1,500.00, representing agreed-upon installment penalties; (b) an award of statutory pre-judgment interest due at the rate of 9% from the date of the breach through October 30, 2009, in the amount of \$7,689.60; plus the per diem rate of \$25.28 from October 31, 2009 to the date of entry of judgment; and (c) an award of attorney's fees pursuant to the attorney's fees clause contained in the promissory notes, and an inquest to determine those fees.

DISCUSSION

Plaintiff contends that he is entitled to judgment as a matter of law for the amounts due under the promissory notes because there are no disputed issues of material fact regarding his entitlement to payment. He also requests interest pursuant to CPLR 5001 as of the date on which payment would have been due, and attorney's fees for the costs incurred in bringing this action.

Defendant argues that summary judgment should be denied because there is a triable issue of fact regarding the payments made in 1999. Specifically, defendant claims that plaintiff's schedule of payments is inaccurate because he began making payments in February 1999, not May 1999; that the schedule fails to account for three months of payments in 1999; that plaintiff improperly attributed a payment received in the beginning of January 2000 to payments for 2000 rather than 1999; that the schedule indicates a \$16,421.68 shortfall for 1999, yet plaintiff did not notify defendant about any shortfall until March 2009; and that plaintiff does not indicate which payments were made in cash. He maintains that the alleged shortfall of \$16,421.68 for 1999 is inaccurate as are all interest calculations.

In reply, plaintiff argues that defendant's factual assertions are unsupported by any evidence. In addition, to remove a possible issue of fact for purposes of this motion, plaintiff accepts defendant's claims regarding the payments made in 1999 and interest carried forward for that year. Plaintiff has, accordingly, revised his schedule of payments.

The standards applicable to summary judgment are well settled. Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

It is well settled that a plaintiff meets his initial burden of demonstrating entitlement to summary judgment for recovery on a promissory note by submitting evidence that the defendant executed the promissory note and failed to make payments in accordance with its terms (*see Cicconi v McGinn, Smith & Co., Inc.*, 35 AD3d 292, 292 [1st Dept 2006]; *Mariani v Dyer*, 193 AD2d 456, 457 [1st Dept 1993]). The burden then shifts to defendant to come forward with

evidentiary proof in admissible form demonstrating the existence of a triable issue of fact (see *Takeuchi v Silberman*, 41 AD3d 336, 337 [1st Dept 2007]; *Silver v Silver*, 17 AD3d 281, 281 [1st Dept 2005]).

Plaintiff has met his prima facie burden of demonstrating entitlement to judgment as a matter of law. Plaintiff has submitted copies of the promissory notes, the execution of which defendant does not dispute.¹ Plaintiff has also submitted his affidavit indicating that defendant failed to make payments in accordance with the terms of the notes, which defendant also fails to dispute (see *Cicconi*, 35 AD3d at 292).

The burden therefore shifts to defendant to come forward with evidentiary proof demonstrating a genuine issue of fact. Here, defendant has failed to meet that burden. He raises no affirmative defenses to the validity of the promissory notes. Nor does he challenge the fact of his default by nonpayment. Defendant's argument that the schedule of payments is inaccurate also fails to raise an issue of fact, as this is merely a challenge to the amount due and not to the default itself. Furthermore, plaintiff has consented to the payments and interest alleged by defendant for 1999, and adjusted the schedule of payments accordingly. Defendant has thus failed to raise an issue of fact warranting a trial (see *Yuen v Wong*, 68 AD3d 475, 476 [1st Dept 2009]; *Takeuchi*, 41 AD3d at 337; *Silver*, 17 AD3d at 281).

Plaintiff's motion for summary judgment is granted, and plaintiff is awarded judgment in the amount of \$102,527.96; pre-judgment interest in the amount of \$7,689.60, plus the per diem rate of \$25.28 from October 31, 2009 to the date of entry of judgment; and attorney's fees and costs. Plaintiff is directed to file a motion in support of his request for attorney's fees within 10 days of the date of this order, and defendant shall have 5 days therefrom to file a reply. An inquest to determine reasonable attorney's fees is scheduled for April 27, 2010 at 3:00 p.m., in

¹Defendant claims that plaintiff submitted an altered copy of a promissory note containing an incorrect date of maturity. The affirmation of plaintiff's counsel states that he inadvertently attached the wrong document, and the Court is persuaded this was a mistake and not an attempt to mislead the Court.

Part 7, at 80 Centre Street.

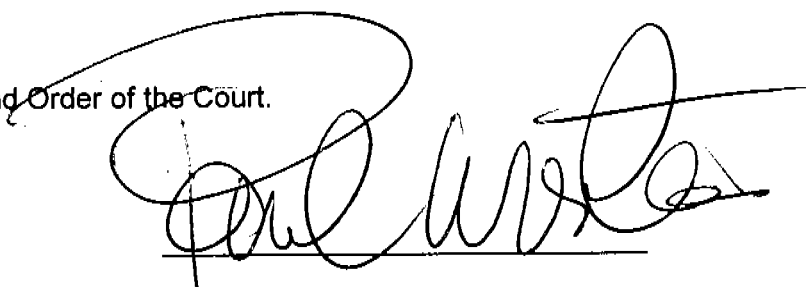
For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiff's motion for summary judgment is granted, and plaintiff is awarded judgment in the amount of \$102,527.96; pre-judgment interest in the amount of \$7,689.60, plus the per diem rate of \$25.28 from October 31, 2009 to the date of entry of judgment; attorney's fees; and costs as taxed by the Clerk of the Court; and it is further,

ORDERED that the portion of plaintiff's action that seeks the recovery of attorney's fees is severed and an assessment thereof is directed; and it is further,

ORDERED that plaintiff shall serve a copy of this order, with notice of entry, upon defendant.

This constitutes the Decision and Order of the Court.



Dated: March 30, 2010

Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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