

Marijosius v Nemickas

2010 NY Slip Op 33463(U)

December 7, 2010

Supreme Court, Nassau County

Docket Number: 011539-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
MARIUS MARIJOSIUS,

Plaintiff,

-against-

ANITA NEMICKAS ,

Defendant.

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Index No: 011539-08

Motion Seq. No: 2

Submission Date: 10/19/10

The following papers have been read on this motion:

- Notice of Motion, Affidavit, and Exhibits.....x**
- Affirmation in Support.....x**

This matter is before the Court for decision on the Motion for Summary Judgment in Lieu of Complaint filed by Plaintiff Marius Marijosius ("Plaintiff" on October 5, 2010 and submitted on October 19, 2010. For the reasons set forth below, the Court 1) grants Plaintiff's motion for summary judgment in lieu of a complaint; and 2) refers the matter to an inquest for the determination of interest and late fees.

BACKGROUND

A. Relief Sought

Plaintiff requests an Order, pursuant to CPLR § 3213, directing the entry of judgment in favor of Plaintiff and against Defendant Anita Nemickas ("Defendant") in the sum of \$338,385.15, with interest from January 1, 2002, based on Defendant's failure to make required payments pursuant to a promissory note.

Defendant has provided no opposition, or other response, to Plaintiff's motion.

B. The Parties' History

Plaintiff provides an Affidavit in Support dated March 24, 2010 in which he affirms as follows:

Plaintiff resides in Port Washington, New York and Defendant resides at 55 Hopewell Woods Road, Redding, Connecticut 06896 ("Connecticut Address"). Defendant first approached Plaintiff to request assistance in financing Defendant's business ventures in the garment trade. Defendant operated businesses including J.A. Associates of N.Y. Inc., which had a principal place of business in the Bronx, New York, and Nemcon Associates, located in Bethel, Connecticut. Plaintiff agreed to provide Defendant with the requested financing.

Plaintiff alleges that "[t]hese individual deals matured from time to time and I kept increasing my investment by rolling over one deal into the next one. I never took a cash payout at the completion of a transaction" (P's Aff. at ¶ 4). Defendant advised Plaintiff that she had lost money on several transactions and did not have the funds to repay Plaintiff. On or about October 29, 2001, Defendant executed and delivered to Plaintiff a promissory note ("Note"), of which Plaintiff provides a copy, in which Defendant agreed to repay the sum of Three Hundred Seventy Seven Thousand Four Hundred Dollars and Fifty Five Cents (\$377,400.55), with interest of Eight and One-Half (8- 1/2%) per annum. The payments were to be made quarterly, in the amount of \$25,000, inclusive of interest. Payments not made within five (5) days of the scheduled payment date were subject to a late charge of 5% of the late payment amount.¹ In addition, upon default, the Note was subject to an interest rate of 12%, at the option of Plaintiff, as the holder of the Note. The Note reflects that Defendant resided at the Connecticut Address, and is signed by the Defendant. The Note also provides, *inter alia*, that 1) it shall be governed by the laws of New York State; and 2) Defendant expressly waived presentment, demand notice, protest, and all other demands and notices in connection with the Note.

Plaintiff affirms that Defendant made payments on the Note in the sum of \$39,015.40 but has made no payments since March of 2006. Plaintiff avers that he has remained in contact with Defendant who has "offered various excuses for this erratic payment behavior" (P's Aff. at ¶ 8) but continues to be in default of her obligations. As of March 24, 2010, the date of Plaintiff's

¹ Paragraph 9 of the Note, however, reflects that the late charge will be imposed if payment is not made within seven (7) days of the due date.

affidavit, Defendant owes Plaintiff principal in the sum of \$338,385.15, plus interest at the rate of 12% per annum and late payment fees of \$21,250.00.

Plaintiff provides an Affidavit of Service reflecting service of the motion and supporting papers on Defendant at the Connecticut Address on September 16, 2010. That service was effected by delivering a copy of the motion and supporting papers on a person of suitable age and discretion, and mailing a copy of those papers to Defendant at the Connecticut Address.

RULING OF THE COURT

A. Motion for Summary Judgment in Lieu of Complaint

CPLR § 3213 provides as follows:

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. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

The purpose of CPLR § 3213 is to provide a speedy and effective means of securing a judgment on claims that are presumptively meritorious. *J.D. Structures, Inc. v. Waldbaum*, 282 A.D.2d 434 (2d Dept. 2001).

A motion for summary judgment in lieu of a complaint in an action on a negotiable instrument will be granted only when it is clear that no triable issue or real question of fact is presented *First International Bank, Ltd. v. L. Blankstein & Son, Inc.*, 59 N.Y.2d 436 (1983), when the defense raised is unrelated to the plaintiff's cause of action *Parry v. Goodson*, 89 A.D.2d 543 (1st Dept. 1982), or when the defense is clearly without merit *Gateway State Bank v. Shangri-La Private Club for Women, Inc.*, 113 A.D.2d 791, 792 (2d Dept. 1985).

B. Promissory Note

A promissory note is an instrument for the payment of money only for the purpose of CPLR § 3213. *Davis v. Lanteri*, 307 A.D.2d 947 (2d Dept. 2003); *East New York Savings Bank v. Baccaray*, 214 A.D.2d 601 (2d Dept. 1995). To establish a *prima facie* case on a promissory note, a plaintiff must establish the existence of the instrument and the defendant's failure to make payment pursuant to the terms of the instrument. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 A.D.3d 708 (2d Dept. 2008); *Mangiatordi v. Maher*, 293 A.D.2d 454 (2d Dept. 2002).

Once plaintiff has met its burden, the defendant must then establish by admissible evidence the existence of a triable issue concerning a bona fide defense. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, *supra*; *Northport Car Wash, Inc. v. Northport Car Care, LLC*, 52 A.D.3d 794 (2d Dept. 2008). Bald, conclusory allegations are insufficient to defeat a motion for summary judgment in lieu of a complaint. *Federal Deposit Ins. Corp. v. Jacobs*, 185 A.D.2d 913 (2d Dept. 1992).

C. Jurisdiction over Defendant

CPLR § 313, titled "Service without the state giving personal jurisdiction" provides as follows:

A person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302, or his executor or administrator, may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state or by any person authorized to make service by the laws of the state, territory, possession or country in which service is made or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction.

CPLR § 302 provides, in pertinent part:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary...who in person or through an agent: 1) transacts any business within the state...; or 2) commits a tortious act within the state...; or 3) commits a tortious act without the state causing injury to a person or property within the state...if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

Personal jurisdiction over a defendant that engages in purposeful activity is proper because the defendant has invoked the benefits and protections of our laws. *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508 (2007). Thus, a defendant may transact business in New York and be subject to personal jurisdiction even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted. *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007).

D. Application of these Principles to the Instant Action

First, the Court concludes that Defendant properly effected service of the motion and supporting papers upon Defendant, a resident of Connecticut. By virtue of Defendant's execution of the Note, which provides that New York law shall govern it, and Defendant's involvement in a business located in the Bronx for which Plaintiff provided financing, the Court concludes that Defendant transacted business in New York and, therefore, is subject to the court's jurisdiction pursuant to CPLR § 302(1). Plaintiff properly served Defendant, pursuant to CPLR § 313, by delivering a copy of the motion papers to a person of suitable age and discretion at Defendant's Connecticut Address, and mailing a copy of those papers to Defendant at the Connecticut Address.

Plaintiff has demonstrated his right to judgment against Defendant on the Note by establishing the existence of the Note and the Defendant's failure to make payment pursuant to the terms of the Note. Defendant has provided no response to Plaintiff's motion and, thus, has not raised an issue that would preclude summary judgment. The Court, however, awards interest since March 1, 2006, in light of Plaintiff's affirmation that he has received no payments from Defendant since that date.

In light of the foregoing, the Court grants Plaintiff's motion and awards Plaintiff judgment against Defendant in the sum of \$338,385.15, plus interest since March 1, 2006, and late fees, to be determined at an inquest. Accordingly, it is hereby

ORDERED, that Plaintiff have judgment against Defendants in the sum of \$338,385.15, plus interest since March 1, 2006, and late fees; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the determination of interest and late fees on January 19, 2011 at 9:30 a.m.; and it is further

ORDERED, that counsel for Plaintiff shall serve upon Defendant, by certified mail, return receipt requested, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before January 5, 2011; and it is further

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against the Defendant in accordance with the decision of the Special Referee.

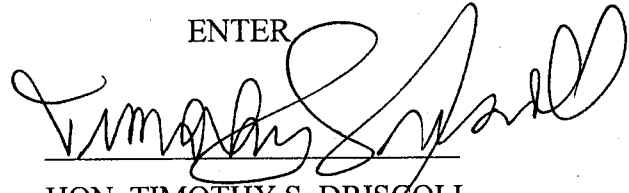
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY

December 7, 2010

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

DEC 09 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE