

Horizon v Hitz

2011 NY Slip Op 30005(U)

January 3, 2011

Supreme Court, New York County

Docket Number: 109451/2010

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C. Justice

PART 10

Index Number : 109451/2010
FIRST HORIZON
vs.
HITZ, ALEXANDER C.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

1 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

FILED
JAN 04 2011

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motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

Dated: 1/3/11

J. GISCHE
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----x
FIRST HORIZON,

Plaintiff,

-against-

ALEXANDER C. HITZ and PIERRE DURAND,

Defendants.
-----x

DECISION/ORDER
Index No.: 109451/10
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.
FILED
JAN 04 2011

Recitation, as required by CPLR 2219 [a], of the papers considered in the New York of this (these) motion(s):

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Papers	Numbered
Pltf n/m (CPLR § 3213) w/AW affid, JE affirms, exhs.	1,2
Affid's of service	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is plaintiff's motion for summary judgment in lieu of a complaint based upon a validly entered foreign judgment which remains unpaid and based upon a promissory note. CPLR § 3213. This motion has been submitted to the court without opposition, and is, therefore, considered by the court on default.

Plaintiff has filed proof that the summons and motion were served on a Alexander C. Hitz ("Hitz") through his doorman, a person of suitable age and discretion, at Hitz's residence on July 27, 2010, which was followed by a mailing. CPLR § 308(2). Pierre Durand ("Durand") was served on July 27, 2010 through his doorman, a person of suitable age and discretion, at Durand's residence. Durand was also served through his secretary, a person of suitable age and discretion, at his actual place of business, which

was followed by a mailing. CPLR § 308(2).

Despite such notice, defendants have neither appeared in this action nor opposed the motion. Their time to do so has expired and has not been extended by the court. Therefore, this motion is submitted on default and plaintiff is entitled to summary judgment provided it otherwise establishes a *prima facie* case.

Arguments

This action is based upon a judgment obtained by plaintiff in the Civil Division of the State Court of Fulton County in the State of Georgia (the "Judgment"). Plaintiff has provided a copy of the Judgment, dated November 4, 2009. The facts of the underlying action are set forth in the affidavit of Art Willard, Assistant Vice President plaintiff. The motion is also supported with the affirmation of Joaquin Ezcurra ("Ezcurra"), attorney for plaintiff. The facts are as follows:

Pursuant to a Promissory Note dated September 29, 2005 ("Note 1") , plaintiff agreed to lend Hitz \$151,000.00 conditioned on Hitz's repayment of the loan plus interest, no later than March 21, 2008. Pursuant to a Promissory Note dated November 2, 2005 ("Note 2"), plaintiff agreed to lend Hitz and Durand \$151,000.00, conditioned on Hitz's and Durand's repayment of the loan plus interest, no later than August 2, 2008. On April 30, 2009, plaintiff commenced an action against Hitz in the Civil Division of the State Court of Fulton County in the State of Georgia based upon Hitz' failure to pay under Note 1. First Horizon, a division of First Tennessee Bank, N.A. v. Alexander C. Hitz, 2009EV007241B.

Hitz failed to answer or appear, and on November 4, 2009, the State of Georgia

entered a default judgment against Hitz in the amount of \$149,806.26, with pre-judgment interest of \$7,411.47 through July 6, 2009, post-judgment interest at a rate of 21% *per annum*, and attorney's fees and expenses of \$47,188.90.

Plaintiff now seeks to enforce that judgment by bringing this motion for summary judgment in lieu of complaint. Plaintiff also seeks summary judgment against Hitz and Durand, jointly and severally, based upon Note 2, as an instrument for the payment of money only.

Discussion

CPLR § 3213 is intended to be an efficient and effective means of securing a judgment on claims that are presumptively meritorious. Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc., 37 N.Y.2d 151 (1975). A motion for summary judgment in lieu of complaint is available when the "action is based upon an instrument for the payment of money only or upon any judgment." CPLR § 3213. Summary judgment in lieu of a complaint is proper when: (1) the instrument itself, and (2) proof of non-payment, without more, make out a *prima facie* cause of action. Seaman-Andwall Corp. v. Wright Machine Corp., 31 A.D.2d 136 (1st Dept. 1968), *aff'd* 29 N.Y.2d 617 (1971). The instruments at issue here, the Judgment and the promissory note, are for the payment of money only, within the meaning of CPLR § 3213.

The Full Faith and Credit Clause of Article IV of the United States Constitution requires the courts of New York to enforce judgments rendered in other states, and precludes inquiry into the merits of the judgment. See Fauntleroy v. Lum, 210 U.S. 230 (1908); Buckeye Retirement Co., L.L.C., Ltd. v. Lee, 41 A.D.3d 183 (1st Dept. 2007).

Furthermore, an instrument for the payment of money qualifies for CPLR § 3213 treatment if it contains an unconditional promise by the debtor to repay lender the monies or money advanced to it or on its behalf for payment. Afco Credit Corp. v. Boropark Twelfth Ave. Realty Corp., 187 A.D.2d 634 (2d Dept. 1992).

Here, the Judgment against Hitz was obtained by plaintiff in the Civil Division of the State Court of Fulton County in the State of Georgia in the amount of \$149,806.26, with pre-judgment interest of \$7,411.47 through July 6, 2009, post-judgment interest at a rate of 21% *per annum*, and attorney's fees and expenses of \$47,188.90. Plaintiff has provided a copy of the Judgment filed November 4, 2009. Although the Judgment provides that the post-judgment interest rate shall be 21% *per annum*, plaintiff seeks reduced interest at a rate of only 16% *per annum*, the maximum allowable interest rate in New York. GOL § 5-501; Banking Law § 14-a.

The instrument at issue here, the Judgment, is for payment of money only, within the meaning of CPLR § 3213, and there are no material issues of fact precluding summary judgment because it is for a sum certain.

Furthermore, Hitz and Durand's failure to make payments under Note 2 constitute a default under the Note. Note 2 qualifies as an instrument for the payment of money under CPLR § 3213. Therefore, plaintiff has established its entitlement to summary judgment against defendants, jointly and severally, in the amount of \$149,276.96. See Afco Credit Corp. V. Boropark, *supra*; Bonds Financial, Inc. v. Kestrel Technologies, LLC, 48 A.D.3d 230 (1st Dept 2008). Plaintiff also seeks interest at a rate of 16% *per annum* from November 4, 2009, though date of entry of judgment.

Accordingly, plaintiff's motion for summary judgment in lieu of complaint is

granted against Hitz based upon the Judgment and is granted against Hitz and Durand, jointly and severally, based upon Note 2.

Legal Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). Here, the Promissory Notes expressly provide that plaintiff may "hire or pay someone else to help collect this Note if Borrower does not pay . . . Borrower will also pay any court costs." Here, Ezcurra states that 12.7 hours were spent on this motion and that another 16 hours are expected to be spent on this matter. Plaintiff, therefore, seeks a total of \$12,077.00 in attorneys fees, in addition to the \$47,188.90 in attorney's fees and expenses that were already awarded by the State Court of Fulton County. This amount seems disproportionate to the amount of work performed, as this a fairly conventional and uncomplicated motion for summary judgment in lieu of complaint. There is no basis for 16 more hours of work, since all that is left is ministerially entering the judgment. The court, therefore, sets the amount of reasonable attorneys fees for this case at \$7,500.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff FIRST HORIZON's motion pursuant to CPLR § 3213 for summary judgment in lieu of complaint based on the Judgment against defendant ALEXANDER C. HITZ is granted and plaintiff is entitled to a money judgment in its favor and against defendant, ALEXANDER C. HITZ , for the unpaid principal sum of

\$149,806.26, with pre-judgment interest of \$7,411.47 through July 6, 2009, post-judgment interest at a rate of 21% *per annum*, and attorney's fees and expenses of \$47,188.90; and it is further

ORDERED that plaintiff FIRST HORIZON's motion pursuant to CPLR § 3213 for summary judgment in lieu of complaint against defendants ALEXANDER C. HITZ and PIERRE DURAND based on Note 2 is granted and plaintiff is entitled to a money judgment in its favor and against defendants, jointly and severally, for the unpaid principal sum of \$149,276.96, together with interest at a rate of 16% *per annum* from November 4, 2009 until entry of judgment; and it is further

ORDERED that plaintiff is awarded legal fees against ALEXANDER C. HITZ and PIERRE DURAND based on Note 2, in the amount of \$7,500; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
January 3, 2011

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED

JAN 04 2011

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