

Capstone Bus. Credit, LLC v Zhong

2011 NY Slip Op 31878(U)

July 5, 2011

Supreme Court, New York County

Docket Number: 603246/09

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: J.S.C.
Justice

PART 10

Capstone Business Credit

INDEX NO. 603246/09

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

Zhong, Michael

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

JUL 08 2011

NEW YORK
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Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

Dated: 7/5/11

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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
CAPSTONE BUSINESS CREDIT, LLC,

Plaintiff,

-against-

MICHAEL ZHONG a/k/a HAIMO ZHONG
and MIAO E. WU,

Defendants.
-----x

DECISION/ORDER
Index No.: 603246/2009
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED

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

Papers	Numbered
Pltf's n/m [CPLR 3213], w/SAB affirm, JR affid, exhs	1
Def's' x/m [602(a)] w/TDG affirm, MZ affid, exhs	2
Pltf's opp&reply w/SAB affirm, exhs	3,4

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

This is plaintiff's ("Capstone") motion for summary judgment in lieu of complaint based upon a mortgage note which remains unpaid. CPLR § 3213. Defendants ("Zhong" and "Wu") oppose the motion and cross-move to consolidate this action with a related action (*Zhong v. Capstone Business Credit LLC*, Index No. 100429/09) ("related action").

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).

An instrument for the payment of money qualifies for summary judgment pursuant to CPLR § 3213 if it contains an unconditional promise by the debtor to repay the lender the moneys advanced to it or on its behalf for payment. Afco Credit Corp. v. Boropark Twelfth Ave. Realty Corp., 187 A.D.2d 634 (2nd Dept. 1992). The instrument at issue here, the mortgage note, is for the payment of money only, within the meaning of CPLR § 3213.

Plaintiff has set forth the following facts in its motion and through the sworn affidavit of John Rice (“Rice”), President of Capstone:

This action is based upon a mortgage note dated August 10, 2007 (the “Note”) entered into between plaintiff and defendants. Pursuant to the Note, plaintiff loaned defendants \$350,000.00, conditioned on defendants’ repayment of the loan, with interest accruing at a rate of 16% per annum, payable in 60 days thereof (October 9, 2007). The Note was secured by a mortgage on defendants’ real property.

Defendants cross-move to consolidate this action, pursuant to CPLR § 602(a), with the related action. Defendants argue that both cases involve common questions of law or fact. Defendants do not dispute that they signed and agreed to the terms of the Note. However, defendants contend that the facts provided in the related action demonstrate that they were fraudulently induced by Capstone and Rice into signing the

Note. Defendant also argues that there are issues of fact requiring the denial of summary judgment because the related action demonstrates that Capstone and Rice defrauded Zhong and Wu.

The related action revolved around a failed business transaction involving financing for the purchase of copper. Zhong asserted six causes of action against Capstone (and other defendants) in that action, including claims for fraud and unjust enrichment. This court ultimately dismissed all of Zhong's causes of action. Decision/Order, Hon. Judith J. Gische, 12/23/09.¹ This court additionally found that issues regarding the mortgage were "entirely separate and distinct" from the transaction alleged in that action. The decision/order stated in relevant part, as follows:

The circumstances of the mortgage by Capstone do not raise any material triable issues of fact. Plaintiff acknowledges he owed a non-party a debt and that Capstone provided a mortgage using his home as collateral. Thus, the mortgage on plaintiff's home is entirely separate and distinct from the transaction in the People's Republic of China involving Regina. Although plaintiff suspects the party were working closely together and they conspired to defraud him, there is simply nothing to support those factual claims.

Accordingly, the court abides by its decision in the related action and finds that, although this action involves similar parties and revolves around the same set of facts, the issue regarding the mortgage note is separate and distinct from the underlying transactions alleged in the related action. Additionally, since the related action was dismissed in its entirety (including all allegations of fraud), there is essentially nothing to

¹Although there is a pending motion to re-argue, the court's prior order is still valid and enforceable.

"consolidate" this action with. Defendants' cross-motion to consolidate is, therefore, denied.

The court finds that the instrument at issue here, the Note, 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.

Defendants' failure to make payments under the Note constitutes a default. Therefore, plaintiff has established its entitlement to summary judgment against defendants, jointly and severally, in the amount of \$350,000.00. See Afco Credit Corp. v. Boropark, *supra*; Bonds Financial, Inc. v. Kestrel Technologies, LLC, 48 A.D.3d 230 (1st Dept 2008). Plaintiff is also entitled to interest at a rate of 16% per annum from October 9, 2007.

Accordingly, plaintiff's motion for summary judgment in lieu of complaint is granted against defendants, jointly and severally.

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 Note expressly provides that defendants are liable for "reasonable attorney's fees." Plaintiff has not yet provided a bill of costs or an affidavit attesting to the fees incurred and the reasonableness thereof. The Court, therefore, schedules a hearing in **Part 10, Room 232 for Thursday, September 22, 2011 at 2:00 p.m.**, regarding the issue of what plaintiff may recover from defendants for its reasonable attorneys fees, costs and disbursements.

Conclusion

It is hereby:

ORDERED that plaintiff CAPSTONE BUSINESS CREDIT, LLC's motion pursuant to CPLR § 3213 for summary judgment in lieu of complaint against defendants, MICHAEL ZHONG a/k/a HAIMO ZHONG and MIAO E. WU, is granted; and it is further

ORDERED that plaintiff is entitled to a money judgment in its favor and against defendants, MICHAEL ZHONG a/k/a HAIMO ZHONG and MIAO E. WU, jointly and severally, for the unpaid principal sum of Three Hundred Fifty Thousand Dollars and Zero Cents (\$350,000.00), with interest at a rate of 16% per annum from August 10, 2007. Entry of judgment, however, is stayed until the issue of legal fees is resolved; and it is further

ORDERED that defendants' cross-motion is denied; and it is further

ORDERED that the issue of what plaintiff may recover from defendants for its reasonable attorney's fees, costs and disbursements is hereby set for a hearing in **Part 10, Room 232 for Thursday, September 22, 2011 at 2:00 p.m.**; 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
July 5, 2011

So Ordered:



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

FILED

JUL 08 2011

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COUNTY CLERK'S OFFICE**