

Pollack v Haberman

2011 NY Slip Op 32508(U)

September 22, 2011

Supreme Court, New York County

Docket Number: 106859/2011

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

Index Number : 106859/2011

PART 61

POLLACK, JOSEPH

vs

HABERMAN, ALAN

INDEX NO. _____

Sequence Number : 001

MOTION DATE _____

SUMMARY JUDGMENT IN LIEU COMPLAINT

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

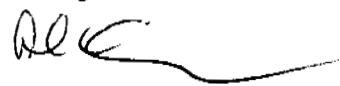
**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

FILED

SEP 22 2011

NEW YORK
COUNTY CLERK'S OFFICE



HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

Dated: 9/20/2011

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X

JOSEPH POLLACK,
Plaintiff,

-against-

ALAN HABERMAN,
Defendant.

-----X

DECISION AND
ORDER

Index No.
106859/2011

FILED

SEP 22 2011

HON. ANIL C. SINGH, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff moves for summary judgment in lieu of complaint pursuant to CPLR 3213, contending that defendant defaulted in the payment of two promissory notes. Defendant opposes the motion.

Plaintiff Joseph Pollack states in a sworn affidavit that this action was commenced to recover amounts due on two promissory notes made by defendant Alan Haberman. The notes were given in connection with loans that he made to defendant and reflect the amount of money loaned – specifically, the sum of \$100,000 in January 2007 and the sum of \$200,000 in June 2008. Plaintiff asserts that, despite “numerous” demands for payment of the principal amounts of the notes, defendant has failed to pay any part of the principal amounts due. Plaintiff contends that a total amount of \$100,000 and \$200,000 is now due on the notes. He asks the court to award summary judgment to him in the amount of \$300,000.

Copies of the notes are attached as exhibits to the summons and notice of

motion.

“A plaintiff moving for summary judgment in lieu of complaint pursuant to CPLR 3213 based on a promissory note establishes prima facie entitlement to judgment as a matter of law by submitting proof of the defendant’s execution of the note and the defendant’s default in making payments pursuant to the note” (Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc., 57 A.D.3d 708, 709 [2d Dept., 2008] (internal citations omitted)). “Once the plaintiff establishes its prima facie entitlement to judgment as a matter of law, the burden shifts to the defendant to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense” (Id.) (internal quotation marks and citation omitted).

The Court finds that the facts set forth in plaintiff’s sworn affidavit, and the promissory notes attached to the affidavit, are sufficient to make out a prima face case that defendant executed the note and defaulted (Alard, LLC v. Weiss, 1 A.D.3d 131, 131 [1st Dept., 2003]).

Defendant raises lack of personal jurisdiction as an affirmative defense. He asserts that the summons and motion were not served properly pursuant to the CPLR.

Plaintiff exhibits the sworn affidavit of process server Mark Avery, who states that he attempted to serve defendant Alan Haberman personally at his actual residence at 11 Mill Pond Road in Sherman, Connecticut. The process server states that he tried calling from the security call box at the community entrance and knocking on the door

of the residence. According to the process server, he made seven attempts to gain admittance. He went to the residence at various times of day on June 14, 21, 24, 25, 27, and 28, 2011. When he received “no answer to repeated knocks on the residence door” on June 28, 2011, he “firmly affixed” the documents “conspicuously on the front door.” The process server then mailed a copy of the documents to defendant.

In addition, plaintiff tried to serve defendant at his actual place of business. Defendant exhibits the sworn affidavit of process server Otis Osborne. He states that on June 16, 2011, he left a copy of the RJL, Summons and Notice of Motion of Summary Judgment with Ada Sweeney, an administrative assistant, at Gala Resources, 1212 Avenue of the Americas on the tenth floor.

Defendant asserts that the tenth floor of 1212 Avenue of the Americas was never his actual place of business, nor was it his place of business at any time whatsoever. Prior to March 1, 2011, he had an office with Gala Resources on the sixth floor of 1212 Avenue of the Americas. Defendant contends that he left Gala Resources on March 1, 2011, and never had an office with them at any location subsequently, including – but not limited to – the tenth floor of 1212 Avenue of the Americas.

With respect to the “nail and mail” service at his residence, defendant points out that the process server was “buzzed into” the community and knocked on the door only on two occasions. If the process server could gain admittance on two occasions, defendant questions why the process server would have failed to gain admittance on

five other occasions. According to defendant, the envelope that was mailed by the process server does not contain a postmark. Finally, defendant states that “to the best of my knowledge and belief, there was never a copy posted to my door.”

The proponent of a motion for summary judgment in lieu of complaint bears the burden of establishing that the defendant was properly served with the motion (Cadle Co. v. Ayala, 47 A.D.3d 919, 920 [2d Dept., 2008]).

If service cannot, with due diligence, be made by the personal delivery method of CPLR 308(1) or by the “deliver and mail” method of CPLR 308(2), a plaintiff may use the “affix and mail” method of CPLR 308(4). “The due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received” (McSorley v. Spear, 50 A.D.3d 652, 653 [2d Dept., 2008], quoting Gurevitch v. Goodman, 269 A.D.2d 355 [2d Dept., 2000]). A failed attempt to make delivery at defendant’s residence may not qualify as due diligence unless the process server has also tried to ascertain defendant’s place of employment for potential delivery to that location (See, for example, O’Connell v. Post, 27 A.D.3d 630 [2d Dept., 2006]).

Here, the Court finds that the process server’s affidavits establish the requisite “due diligence” and, therefore, proper service under CPLR 308(4). We find further that defendant’s conclusory and self-serving affirmations are insufficient to rebut the prima facie evidence of proper service. “A court need not conduct a hearing to

determine the validity of the service of process where the defendant fails to raise an issue of fact regarding service” (Beneficial Homeowner Service Corp. v. Girault, 60 A.D.3d 984, 984 [2d Dept., 2009]).

Next, we turn to defendant’s contention that plaintiff never demanded payment of the entire indebtedness.

Defendant’s contention is meritless for two reasons. First, the notes on their face expressly waive “presentment for payment.” Second, plaintiff was entitled to bring a motion for summary judgment in lieu of complaint without a prior demand for payment on the promissory notes as the notes do not contain any time for payment (Gullery v. Imburgio, 74 A.D.3d 1022, 1023 [2d Dept., 2010]).

For the above reasons, it is hereby

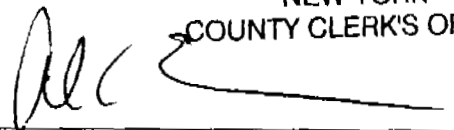
ORDERED that the motion for summary judgment is granted, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$300,000, together with interest at the statutory rate as calculated by the Clerk from the date of entry of judgment, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

FILED

The foregoing constitutes the decision and order of the court.

SEP 22 2011

NEW YORK
COUNTY CLERK'S OFFICE



Anil C. Singh
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

Date: 9/22/11
New York, New York