

Azadi v Ejlal

2012 NY Slip Op 30887(U)

March 30, 2012

Sup Ct, Nassau County

Docket Number: 14853-11

Judge: Steven M. Jaeger

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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:
HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

MOHAMED AZADI,

Plaintiff,

-against-

SHAPOUR EJLAL,

Defendant.

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 14853-11

MOTION SUBMISSION
DATE: 1-20-12

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

- Notice of Motion, Affirmation, and Exhibits X
- Defendant's Attorney Affirmation in Opposition X
- Reply Affirmation in Support X

Motion pursuant to CPLR 3213 for summary judgment in lieu of complaint against defendant is granted as hereinafter provided.

Plaintiff brings this motion for summary judgment in lieu of complaint pursuant to CPLR 3213 for judgment against defendant in an amount not less than \$188,600 plus interest, costs and attorney's fees.

BACKGROUND

The face of the promissory note herein dated “as of September 26, 2007,” states that:

“for value received on August 31, 2008, Shapour Ejlal . . . promises to pay to the order of Mohamed Azadi . . . the principal sum of one hundred fifty thousand (\$150,000.00) dollars (‘the principal sum’), bearing interest at the rate of twelve percent (12% per annum). The entire Principal Sum and any accrued and unpaid interest shall be due and payable on December 26, 2007 (the Maturity Date).”

The promissory note also provides that interest was to be paid in equal monthly payments of \$1500 payable on the 26th day of each month commencing October 26, 2007 until December 26, 2007, at which time the principal sum and any unpaid interest would be due and payable. After the maturity date, interest accrued at the higher rate of 16% (percent). The promissory note calls for a “late payment premium” of 3% (percent) of the unpaid monthly amount as well as reasonable attorney’s fees (cost) incident to the collection of the indebtedness.

It appears from the record that, by the maturity date, defendant who was required to repay the principal and three monthly interest payments of \$1500, had made only the three interest payments for the months of September 2007, October

2007 and December 2007. Subsequent to the maturity date, i.e., December 26, 2007, although defendant continued to make monthly interest payments of \$1500 during the period of February 2008 through September 2010, he failed to pay interest at the increased default¹ rate as required.

To date no portion of the principal has been repaid. Plaintiff maintains that, based on the unpaid principal, the default interest payment is \$2000 per month. Having failed to make the required payments, defendant is in default under the terms of the promissory note.

Defendant does not dispute the fact of his default. He argues in opposition to plaintiff's motion that, subsequent to the execution of the note, the parties' modified the terms of their agreement on several occasions and he had no "legal representation" when he signed the subject promissory note and agreed to the purported subsequent modifications. He further contends that the terms of the

¹With respect to the default interest rate the promissory note provides as follows:

"This Note is subject to the express condition that at no time shall Maker be obligated or required to pay interest on the principal sum at a rate which would subject Payee to either civil or criminal liability as a result of being in excess of the maximum interest rate which Maker is permitted by law to contract or agree to pay. If, by the terms of this Note, Maker is at any time required or obligated to pay interest at a rate in excess of such maximum, the rate of interest shall be deemed immediately reduced to such maximum rate."

promissory note are ambiguous in that, although it is dated September 26, 2007, and all dates within the note reference the year 2007, the first line of the note states:

“for value received on August 31, 2008.”

ANALYSIS

A potential plaintiff may file and serve a summons and motion for summary judgment in lieu of a complaint pursuant to CPLR 3213 if the matter is based upon an instrument for the payment of money only or upon any judgment. Normally, the question of whether the dispute involves an instrument for the payment of money only, is determined by reference to whether any extrinsic evidence, beyond proof of non-payment and the instrument itself, is required to establish a *prima facie* case in order for liability to attach. *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 443-444 [1996]. A document comes within the ambit of CPLR 3213 if a *prima facie* case would be made out by the instrument and the failure to make the payments called for by its terms. *Russo v O'Meara*, 300 AD2d 563 [2nd Dept 2002]. An instrument does not qualify if outside proof is needed other than simple proof of non-payment. *Stallone v Rostek*, 27 AD3d 449, 450 [2nd Dept 2006]. If the instrument requires something in addition to defendant's explicit promise to

pay a sum of money, CPLR 3213 is unavailable. *Ro & Ke, Inc. v Stevens*, 61 AD3d 953 [2nd Dept 2009].

As an instrument for the payment of money only, a promissory note is entitled to the expedited procedure set forth in CPLR 3213. *Friends Lbr. v Cornell Dev. Corp.*, 243 AD2d 886, 887 [3rd Dept 1007]. To establish *prima facie* entitlement to judgment as a matter of law with respect to a promissory note, plaintiff must show the existence of the note executed by defendant containing an unequivocal and unconditional obligation to repay and the failure by the defendant to pay in accordance with the note's terms. *Frankini v Landmark Constr. of Yonkers, Inc.*, 91 AD3d 593, 594 [2nd Dept 2012]. Once plaintiff submits evidence establishing these two elements, the burden shifts to defendant to submit evidence establishing the existence of a triable issue of fact with respect to a *bona fide* defense. *Jin Sheng He v Sing Huei Chang*, 83 AD3d 788, 789 [2nd Dept 2011].

Defendant has failed in this regard. Plaintiff has established that the promissory note at issue is an instrument for the payment of money only. The terms of the note are clear from the face of the instrument. Significantly, the promissory note provides that:

“the failure by the payee to enforce is right of payment . . . or the acceptance of any partial payment shall not be deemed a waiver . . . of his right to receive the entire principal amount and all interest due hereunder.”

and

“the maker . . . waives presentment for payment, demand, notice of dishonor, protest . . . and all other demands and notices . . . in connection with the delivery, acceptance, performance, default or enforcement of this Note.”

It is undisputed that defendant defaulted under the terms of the promissory note herein and that an outstanding balance remains due and owing plaintiff. Notwithstanding assertions by defendant to the contrary, this is not a situation in which outside proof beyond simple proof of non-payment is needed to establish a *prima facie* case of liability. *New York Community Bank v Fessler*, 88 AD3d 667, 668 [2nd Dept 2011]; *Bloom v Lugli*, 81 AD3d 579 [2nd Dept 2011]. Defendant has failed to raise a viable defense to the enforceability of the subject instrument. His opposing papers include nothing of an evidentiary nature on the issue of damages. Moreover, the fact that an obvious typographical error exists *vis-a-vis* the consideration date, 2008 instead of 2007, does not render the instrument ambiguous in view of the fact that the promissory note is dated “as of September 26, 2007, the check in the amount of \$150,000 issued by plaintiff to defendant is dated September 27, 2007 and defendant commenced performance thereunder on October 26, 2007.

The determination of whether a writing is ambiguous, and the construction and interpretation of an unambiguous written agreement are issues of law within the province of the court. *Katina v Farmiglietti*, 306 AD2d 440, 441 [2nd Dept 2003].

Under the circumstances herein, plaintiff's motion for summary judgment in lieu of complaint is granted as to liability. The issue of damages, including calculation of the amount due and owing for interest, costs of collection and reasonable attorney's fees shall be set down for an inquest.

It is hereby ordered that, subject to the discretion of the Justice then presiding this matter shall appear on the calendar of the Calendar Control Part on July 2, 2012 at 9:30 a.m. The directive with respect to the hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

Plaintiff shall serve and file a Note of Issue no later than sixty (60) days of the entry of this order in default of which the action shall be deemed abandoned (CPLR §3216). The Notice of Issue shall be accompanied by a copy of this Order and proof of service that this Order has been served upon all parties to the action within fifteen (15) days of the entry of this Order.

Defendant's unsubstantiated allegations that the promissory note is ambiguous, *vis-a-vis* "the terms and language contained within the four corners of the note and the amount of money allegedly due and owing, that the interest charged "may" be usurious in violation of General Obligations Law § 5-501, and that questions exist with respect to the amount of interest already collected, and the amount of principal due and owing do not constitute *bona fide* defenses to the motion. Nor has defendant stated a viable defense by claiming that, since he has repaid the sum of \$58,500, plaintiff's attempt to recover an amount in excess of the amount borrowed may be illegal or usurious.

Since the instrument does not provide for the payment of a sum certain with respect to the recovery of an attorney's fee in the event of default in payment, the amount of such award will be determined at the hearing to be held in this matter. *Premium Assignment Corp. v Utopia Home Care, Inc.*, 58 AD3d 709 [2nd Dept 2009].

This constitutes the Decision and Order of the Court.

Dated: March 30, 2012



STEVEN M. JAEGER, A.J.S.C.

ENTERED

APR 02 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE