

Nemiroff v Sullivan

2012 NY Slip Op 31492(U)

May 18, 2012

Sup Ct, Nassau County

Docket Number: 601345/2011

Judge: Lawrence K. Marks

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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STEVEN NEMIROFF and SHARI NEMIROFF :

Plaintiffs, :

- against - : Index No. 601345/2011

PAUL SULLIVAN, :

Defendant. :

-----X

LAWRENCE K. MARKS, J.

Plaintiffs Steven Nemiroff and Shari Nemiroff (jointly, “the Nemiroffs”) move for summary judgment in lieu of complaint, pursuant to CPLR § 3213, against defendant Paul Sullivan.

BACKGROUND

Defendant Sullivan had been the Nemiroffs’ stock broker and financial consultant. Mot Br at 2. Plaintiffs aver that, in April 2005, it was discovered that Sullivan had conducted numerous unauthorized and improper stock purchases and transactions, resulting in losses to the Nemiroffs in excess of \$200,000. *Id.* at 2-3.

To resolve their dispute, the parties signed a Stipulation of Settlement, notarized on June 7, 2005 and again on June 8, 2005. *Id.* at 2; *id.*, Exh A (“Stipulation”). Under the Stipulation, Sullivan was to repay the Nemiroffs \$200,000, in 40 monthly installments of \$10,000. Stipulation, ¶ 1. The first monthly installment would be due on October 1,

2005, and the remaining monthly installments would thereafter be due on the first day of each of the following 39 months. *Id.* Pursuant to the terms of the Stipulation, if Sullivan failed to make any payment on the due date, or within 15 days thereafter, the entire balance would become due immediately, plus interest of 9% on the quarterly balance at the end of each quarter. *Id.*, ¶ 2. In the event of a default, Sullivan agreed that the Nemiroffs could enter judgment against him, in any court of competent jurisdiction, for the entire balance due, plus 9% interest from the date of default, “plus any other or additional moneys owed by” Sullivan to the Nemiroffs as a result of Sullivan’s “improper and unauthorized stock purchases and trades.” *Id.*, ¶ 3. If Sullivan complied with all the terms and conditions of the Stipulation, he would “be deemed to be released from any further liability” to the Nemiroffs. *Id.*, ¶ 4.

Plaintiffs allege that Sullivan’s payment history “was inconsistent, at best” - - in both timing and amount. Mot Br at 3. The initial payment, due on October 1, 2005, was not made until January 15, 2007. *Id.* The last payment received by the Nemiroffs, made by Sullivan on October 1, 2010, was in the amount of \$600, rather than \$10,000. *Id.* In all, plaintiffs allege that Sullivan paid \$153,830 of the \$200,000. *Id.* The Nemiroffs aver that, after calculating in the 9% interest provided in the Stipulation, defendant still owed them \$142,328.15. *Id.* at 4; Mot Br, Exh B.

Plaintiffs seek to collect this sum from Sullivan and they moved pursuant to CPLR § 3213 for summary judgment in lieu of complaint, arguing that it is an appropriate and

effective means of collecting the money owned to them under the Stipulation. Mot Br at

2. The Nemiroffs also request interest at the rate of 9% per annum accruing after November 30, 2011, and costs and attorneys' fees. *Id.* at 5.

DISCUSSION

The purpose of summary judgment in lieu of complaint is “to provide quick relief.” *Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 443 (1996). Under CPLR § 3213: “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.” CPLR § 3213, therefore, allows “actions based upon an instrument for the payment of money only” to be commenced with a motion for summary judgment, rather than a complaint, to provide

‘a speedy and effective means’ for resolving ‘presumptively meritorious’ claims. A party utilizing this accelerated judgment procedure prevails ‘if, upon all the papers and proof submitted, the cause of action . . . shall be established sufficiently to warrant the court as a matter of law in directing judgment’ for the plaintiff. A defendant can defeat a CPLR 3213 motion by offering evidentiary proof sufficient to raise a triable issue of fact.’

Banco Popular N. Am. v. Victory Taxi Mgmt., Inc., 1 N.Y.3d 381, 383 (2004) (internal citations omitted). Where the document at issue is a settlement agreement, and it has been established that the non-moving party has “failed to make the payments required by the settlement agreement, which is an instrument for the payment of money only . . . it is

appropriate . . . to grant summary judgment pursuant to CPLR 3213.” *J.D. Structures, Inc. v. Waldbaum*, 282 A.D.2d 434, 436 (2d Dep’t 2001). *See also Krape v. PDK Labs, Inc.*, 34 A.D.3d 751, 752-53 (2d Dep’t 2006).

Sullivan contends that this dispute should be resolved by litigation, following a summons and complaint, rather than a motion for summary judgment in lieu of complaint. R. Sullivan Aff, ¶¶ 1-2. He asserts that, if a summons and complaint were served, he would interpose an affirmative defense of statute of limitations. R. Sullivan Aff, ¶ 2. He argues that the Stipulation is not a dated agreement, nor is there any date on the document that reflects when it was signed and, therefore, an issue exists as to the statute of limitations. *Id.* Defendant claims that the six-year statute of limitations begins to run on the date from which each installment became due and that, with regard to the first installment, more than six-years has passed since it was due on October 1, 2005. *Id.*, ¶ 4.

The Nemiroffs respond to the question that defendant raised regarding the date of the Stipulation by noting the June 7 and 8, 2005 dates in the Notary acknowledgments of the parties’ signatures. Turkish Aff, ¶ 6. The Nemiroffs further argue that the default is well within the six-year statute of limitations period. *Id.*, ¶ 11.

In this, the plaintiffs are correct. No evidentiary proof has been submitted that would create a triable issue of fact with regard to the time frame for the Stipulation. Indeed, Sullivan has not even raised an argument as to why the dates on the Stipulation for when the parties’ signatures were notarized might not be accurate. With regard to the

dates of payments, in his submitted papers, Sullivan addresses the timing of when the first payment was due, and when it was paid. R. Sullivan Aff, ¶¶ 4-5. Even at oral argument, defendant only expanded the discussion to the first two payments. However, Sullivan failed to raised a basis for why money that he already paid to plaintiffs would not have been credited to the earliest payments due. As such, none of the statute of limitations assertions raised by defendant, are reasonable. At bottom, Sullivan put forth no evidence that would contradict that the first two payments were made to plaintiffs within the six-year statute of limitations, or that contradict in any way the record of payments submitted by the Nemiroffs. *See generally*, R. Sullivan Aff; Mot Br, Exh B.

Sullivan also argues that there is a triable issue of fact as to whether plaintiffs' claims are barred by the doctrine of equitable estoppel. R. Sullivan Aff, ¶ 4. He argues that, since no action was previously commenced against him under the Stipulation, he has a right to prove that he was misled into paying a reduced amount for years. *Id.*, ¶ 5.

In replying to this contention, plaintiffs note that defendant Sullivan's opposition consists only of an affidavit from his counsel, and that this Affirmation of Robert G. Sullivan, Esq. (a different individual than defendant Paul Sullivan), is submitted only in his capacity as an attorney and does not state that he has personal knowledge of any of the underlying facts. Turkish Aff, ¶¶ 2, 8.

Again, in this, plaintiffs are correct. Defendant has not offered any evidentiary proof in support of equitable estoppel, not even his own affidavit. Nor did defendant

request at oral argument the opportunity to supplement or correct his submissions to this Court. As such, Sullivan has failed to raise a triable issue of fact sufficient to defeat the instant motion.

As to the amount in dispute, defendant has put forth no evidence to rebut or contradict the figures provided by the plaintiffs. *See* Mot Br, Exh B; *see generally*, R. Sullivan Aff. As such, the Nemiroffs have established their entitlement to the \$142,328.15 they seek in this motion. As noted above, the Stipulation also provides that in the event that Sullivan defaults, the Nemiroffs may seek an additional 9% interest from the date of default, “plus any other or additional moneys owed by” Sullivan to the Nemiroffs as a result of Sullivan’s “improper and unauthorized stock purchases and trades.” Stipulation, ¶ 3. However, nothing in the language of the Stipulation indicates that these “other or additional moneys” relate to litigation costs and attorneys fees that the Nemiroffs seek in the instant motion. Rather, a plain reading of the agreement would indicate that this refers to the funds that the Nemiroffs claim they lost in excess of the \$200,000 at issue in the Stipulation. *Id.*; Mot Br at 2-3. Therefore, the Court awards the Nemiroffs the 9% interest they seek in this motion, but declines to award costs and attorneys’ fees.

The Court has considered the parties’ other arguments, and finds them unavailing.

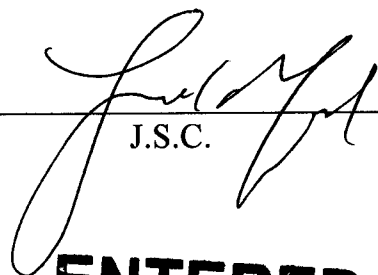
Accordingly, it is

ORDERED that the motion of plaintiffs Steven Nemiroff and Shari Nemiroff, motion sequence # 1, for summary judgment in lieu of complaint pursuant to CPLR § 3213, is granted insofar as plaintiffs are awarded \$142,328.15, plus interest at the rate of 9% per annum accruing from November 30, 2011, against defendant Paul Sullivan, and the motion is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: May 18, 2012

ENTER:



J.S.C.

ENTERED
JUN 04 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE