

<b>Porcelli v Sharangi Rest, LTD</b>
2013 NY Slip Op 30355(U)
January 29, 2013
Supreme Court, New York County
Docket Number: 153467/2012
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

PRESENT: \_\_\_\_\_  
Justice

PART 61

Index Number : 153467/2012  
PORCELLI, JOSEPH  
vs.  
SHARANGI REST. LTD  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

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 the original order.*

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

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

Dated: 1/25/13

*ACS*  
\_\_\_\_\_, J.S.C.  
HON. ANIL C. SINGH  
SUPREME COURT JUSTICE

- 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 PORCELLI

Plaintiff,

-against-

SHARANGI REST, LTD, CHRISTIAN DIGENNARO,  
and JOHN DIGENNARO,

Defendants.

-----X

DECISION AND  
ORDER  
Index No. 153467/2012

HON. ANIL C. SINGH, J.:

Plaintiff Joseph Porcelli filed the subject motion for summary judgment in lieu of complaint pursuant to CPLR 3213 to collect the balance due on a promissory note executed by the defendants in the plaintiff's favor. The defendants oppose the motion on the grounds that: a) plaintiff excused payment of the balance of the note in consideration for the defendants obtaining a release of the plaintiff's personal guaranty of rent owed pursuant to a lease and b) the mother of defendant Christian DiGennaro ("CD"), Linda DiGennaro ("Ms. DiGennaro"), paid plaintiff \$10,000 in partial satisfaction of the outstanding balance of the note.

In brief, the pertinent facts alleged are as follows. On or about August 11, 2008, defendants Sharangi Rest. Ltd., d/b/a 2 Rivers ("Sharangi"), and CD issued a \$42,000 promissory note payable to plaintiff. This sum represented the purchase price of corporate stock that plaintiff held in Sharangi. The note read as follows:

For value received SHARANGI REST., LTD. with principal office address 10 Murray Street, New York, New York 10008 and CHRISTIAN JOHN DIGENNARO residing at (collectively referred to hereinafter as "MAKER") jointly and severally promise to pay to Joseph Porcelli residing at 70 Verandah Place, Brooklyn,

NY 11201, the sum of FORTY-TWO THOUSAND and 00/XX (\$42,000) DOLLARS, non-interest bearing as follows:

\$10,000.00 upon execution of the note herein;  
\$1,000.00 per month on August 1, September 1, October 1, November 1, and December 1, 2008;  
\$5,000.00 on January 1, 2009 (*sic*)  
\$1,000.00 per month on February 1, 2009 through and including December 1, 2009;  
\$5,000.00 on January 1, 2010; and  
\$1,000.00 per month on February 1, 2010 through and including July 1, 2010 when the entire sum is paid in full.

In the event of default of any payment of principal or interest due herein or any other obligations of MAKER to HOLDER and if said default continues for a period of ten days, then and in that event any without (*sic.*) further notice, all sums due herein shall become immediately due and payable. Interest after default shall be at the rate of 18% per annum. MAKERS (*sic*) waives presentment, protest, and notice of dishonor and MAKERS (*sic*) waives its right to all other notices or demands that otherwise may be required by law. In the event this matter is turned over to an attorney for collection, MAKER agrees to pay all costs of collection including reasonable attorney's fees of 20%. No provision of this note shall be modified except by a written instrument expressly referring to this note and to the provision modified and signed by both parties. This note and provisions hereof are to be binding on the heirs, executors, administrators, assigns or successors of the MAKERS (*sic*). This note may be prepaid without penalty. This note shall become due and payable upon any sale of the business; SHARANGI REST. LTD., d/b/a 2 Rivers at 10 Murray Street, New York, New York 10007. In the event that any clause of this agreement is unenforceable, then such clause shall be severed and the remaining clauses shall remain in full force and effect. The provisions of this instrument are to be construed according to, and are to be governed by the Laws of the State of New York.

In conjunction with the issuance of the note, defendant John DiGennaro ("JD"), CD's father, executed a personal guaranty to pay the amount due under the note. Having paid \$21,840, the defendants ceased to make any further payments on the note after December 27, 2009.

In their affirmation in opposition, the defendants contend that they paid the \$20,160 balance by securing a release of plaintiff's Good Guy Guarantee, which plaintiff issued in favor of Sharangi's former landlord, 11 Park Place LLC ("landlord"). On or about June 2002, Sharangi leased the ground floor of 11 Park Place in Manhattan from the landlord. To induce the landlord to lease the premises, plaintiff executed a Good Guy Guaranty by which he was obligated to pay any rent arrears owed by Sharangi. On January 7, 2010 the landlord evicted Sharangi and commenced an action in New York Civil Court, index number 089977/09, over which I presided, seeking \$60,923.78 in unpaid rent. Ultimately, the landlord and Sharangi entered into a Stipulation of Settlement whereby, in pertinent part, Sharangi agreed to pay the landlord \$25,000 in full satisfaction of the landlord's claim, and the landlord agreed to release plaintiff from his obligation under the Good Guy Guaranty. However, nearly two years prior, on August 11, 2008, plaintiff and defendants CD and Sharangi entered into a contract for the sale of shares in Sharangi held by plaintiff. Pursuant to a rider to the contract, CD and Sharangi agreed to obtain a release of the aforementioned Good Guy Guaranty from the landlord. The parties to the present action also entered into an indemnification agreement whereby the defendants agreed to indemnify plaintiff against any suit, judgment, claim, or liability arising out of the operation of Sharangi's business. With the \$21,160 balance of note allegedly unpaid, plaintiff filed the present action in New York Civil Court, which was transferred to this court in April 2012 by Judge Margaret Chan.

CPLR 3213 authorizes a plaintiff to file a motion for summary judgment in lieu of complaint when the action is based on an instrument for the payment of money only. The subject note here bears the requisite indicia of a negotiable instrument. Pursuant to UCC 3104, an

enforceable promissory note must be: signed by the maker; contain an unconditional promise to pay a sum certain in money; contain no other promise or power given by the maker except as authorized by Article 3; be payable on demand or at a definite time; and be payable to order or to bearer.

Because the instrument is an instrument for the payment of money only, plaintiff's action is one with respect to which no other showing besides nonpayment is required. *See Bloom v. Lugli*, 81 A.D.3d 579, 580 [2d Dept 2011]; *Seaman-Andwall Corp. v. Wright Machine Corp.*, 295 N.Y.S.2d 752, 755 [1st Dept 1968]. Nothing requires the court to consider evidence outside of the promissory note to determine whether it is, in fact, the requisite type of instrument. The defendants' promise to pay was unconditional, and defendants failed to pay according to the terms of the note. *See Wachovia Bank, N.A., v. Silverman*, 923 N.Y.S.2d 496, 497 [1st Dept 2011]; *Solomon v. Langer*, 885 N.Y.S.2d 904 [1st Dept 2009]. Therefore, the plaintiff has established his prima facie case because the promissory note is an "instrument for the payment of money only" that the defendants were obligated to pay. *See Lorber v. Morovati*, 922 N.Y.S.2d 109, 110 [2d Dept 2011] (denying plaintiff's 3213 motion on the grounds that the promissory note was "intertwined" with a purchase agreement between the parties); *and Weissman v. Sinorm Deli, Inc.*, 88 N.Y.2d 437, 445 [1996]. That the note requires the payment of attorneys' fees and interest in the event that the defendants defaulted does not transform plaintiff's action into one *other than* for the payment of money only. *See Desiderio v. Devani* 806 N.Y.S.2d 240, 243 [2d Dept 2005]; *and Simoni v. Time-Line, Ltd.*, 708 N.Y.S.2d 142, 144 [2d Dept 2000].

Notwithstanding that the plaintiff has presented a prima facie case, the defendants have raised a triable issue of fact with respect to a defense to their obligation to pay the balance due on

the subject note. See *Banner Ind., Inc. v. Key B.H. Assoc., L.P.*, 565 N.Y.S.2d 456 [1st Dept 1991]. Essentially, defendants assert that the plaintiff modified the terms of the promissory note and excused defendants' obligation to pay the balance in money. According to the defendants, through negotiations conducted over a series of emails between plaintiff and CD, two years after the note was executed, plaintiff excused defendants from paying the balance of the promissory note in consideration for accepting a check for \$6,000 and a release of his obligation to Sharangi's landlord under the Good Guy Guaranty (affirmation in opposition of defendant's counsel at 3).

The terms of a promissory note may be subsequently modified without the exchange of consideration if the modification is in writing and signed by the party to be charged. *Citibank, N.A., v. Rice Aircraft, Inc.*, 576 N.Y.S.2d 560 [1st Dept 1991]; see also General Obligations Law § 5-1103. Plaintiff's email to CD, dated April 6, 2010, may have constituted an offer to modify the note that was accepted by CD (affirmation in opposition of defendant's counsel, Exhibit B). Even if plaintiff is correct in his contention that the defendants were already obligated to obtain a release of his duty under the Good Guy Guaranty, the defendants were not required to supply new consideration to modify the note under these circumstances. See *Liberty Nat. Bank v. Gross*, 607 N.Y.S.2d 419, 421 [2d Dept 1994]; see also General Obligations Law § 5-1105. Furthermore, the note did not expressly prohibit modification of its terms by means of a written agreement. See *Ness v. Fellus*, 939 N.Y.S.2d 25 [1st Dept 2002].

Accepting defendants' theory of the case would not require this court to consider parol evidence contradicting the terms of the note, given that the note does not prohibit written modification. See *Ruder v. Lewandowski*, 571 N.Y.S.2d 224, 225 [1st Dept 1991]. Therefore,

there is an issue of fact as to whether the parties agreed to discharge defendants' obligation on the note in exchange for obtaining a release of plaintiff's duty under the Good Guy Guaranty.

Accordingly, it is hereby

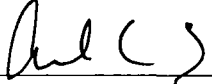
ORDERED that plaintiff's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiff serve a formal complaint upon defendants' attorney within 20 days of service on plaintiff's counsel of a copy of this order with a notice of entry; and it is further

ORDERED that defendants shall move against or serve an answer to the complaint within 20 days thereof.

The foregoing constitutes the decision and order of the court.

Date: 1/29/13  
New York, New York

  
\_\_\_\_\_  
Anil C. Singh  
**HON. ANIL C. SINGH**  
**SUPREME COURT JUSTICE**