

<b>Sprung v 373 Blatchley 2003, Inc.</b>
2013 NY Slip Op 31491(U)
July 3, 2013
Supreme Court, New York County
Docket Number: 651498/2013
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH  
*Justice*

PART 54

Index Number : 651498/2013  
SPRUNG, JOSEPH B  
vs.  
373 BLATCHLEY 2003  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO. \_\_\_\_\_  
MOTION DATE 6/27/13  
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). 1-8

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

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

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

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

Dated: 7/13/13

**SHIRLEY WERNER KORNREICH**  
*[Signature]*  
J.S.C.

- 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 54

-----X  
JOSEPH B. SPRUNG,

Index No.: 651498/2013

Plaintiff,

**DECISION & ORDER**

-against-

373 BLATCHLEY 2003, INC., MICHAEL  
SHAMASH and ARASH GILARDI,

Defendants.

-----X  
SHIRLEY WERNER KORNREICH, J.:

Plaintiff Joseph B. Sprung moves for summary judgment in lieu of complaint against defendants 373 Blatchley 2003, Inc., Michael Shamash, and Arash Gilardi pursuant to CPLR 3213. Plaintiff's motion is granted, on default, for the reasons that follow.

*Factual Background*

On March 15, 2010, the parties executed a Promissory Note (the Note), whereby defendants agreed to repay a \$250,000 loan to plaintiff by March 14, 2011. Pursuant to the Note, defendants agreed to make interest-only monthly payments of \$2,500 until the loan was repaid. Plaintiff has the right to declare the Note in default if defendants miss a monthly interest payment. The Note provides for 16% annual interest upon default. Defendants did not repay the principle amount on March 14, 2011, but continued to make monthly interest payment through November 2012. However, defendants defaulted on the Note when they failed to make an interest payment on December 15, 2012. Defendants have not made any further payments under the note since then.

In a letter dated March 20, 2013, plaintiff gave defendants written notice of their default.

Plaintiff commenced this action on April 25, 2013, by filing the instant motion for summary judgment in lieu of complaint, asserting a claim for (1) \$263,333.33, which includes the \$250,000 in principle and the \$13,333.33 in interest that accrued between December 15, 2012 and April 15, 2013; (2) default interest under the note of \$109.58 per diem from April 16, 2013 to the date judgment is entered; and (3) attorneys' fees.

### *Discussion*

“Pursuant to CPLR 3213, a party may commence an action by motion for summary judgment in lieu of complaint when the action is ‘based upon an instrument for the payment of money only or upon any judgment.’” *Lawrence v Kennedy*, 95 AD3d 955, 957 (2d Dept 2012). “An instrument is considered to be for the payment of money only if it contains an unconditional promise to pay a sum certain over a stated period of time.” *Id.*, citing *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 (1996). “However, ‘[t]he instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document.’” *Id.* A motion for summary judgment in lieu of complaint is governed by the usual standards for motions for summary judgment brought pursuant to CPLR 3212. *McBean v Goodman*, 27 Misc3d 1212(A), at \*2 (Sup Ct, Kings County 2010), citing *Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791 (2d Dept 1985).

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated*

*Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

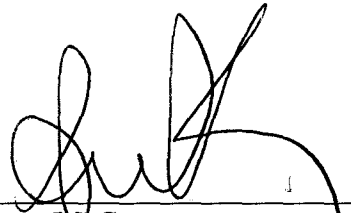
Plaintiff has established his *prima facie* case by submitting evidence of defendants' default on their obligations under the Note. Defendants were duly served, but did not submit opposition papers. Therefore, the court grants summary judgment to plaintiff against defendants in the amount of \$263,333.33 plus per diem interest of \$109.58 from April 16, 2013 to the date judgment is entered. However, plaintiff may not recover his attorneys' fees because the Note does not provide for such recovery. Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint by plaintiff Joseph B. Sprung is granted against defendants 373 Blatchley 2003, Inc., Michael Shamash, and Arash Gilardi, and the Clerk is directed to enter judgment in favor of said plaintiff and against

said defendants in the sum of \$263,333.33 plus per diem interest of \$109.58 from April 16, 2013 to the date judgment is entered.

Dated: July 3, 2013

ENTER:

  
\_\_\_\_\_  
J.S.C.