

Sprung v 1907 Southern 2007 LLC

2013 NY Slip Op 32441(U)

October 7, 2013

Sup Ct, New York County

Docket Number: 651716/2013

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 651716/2013
SPRUNG, JOSEPH B.
vs
1907 SOUTHERN 2007 LLC
Sequence Number : 001
SUMMARY JUDGMENT IN LIEU OF COMPLAINT

PART 54

INDEX NO. _____

MOTION DATE 8/30/13

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) 1-14

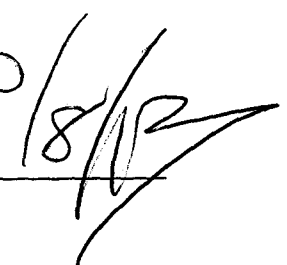
Answering Affidavits — Exhibits _____ | No(s) _____

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: 10/8/13 

SHIRLEY WERNER KORNREICH  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.: 651716/2013

Plaintiff,

DECISION & ORDER

-against-

1907 SOUTHERN 2007 LLC, MAYKEL
SHAMASH and ARASH GILARDI,

Defendants.

-----X

SHIRLEY WERNER KORNREICH, J.:

Plaintiff Joseph B. Sprung moves for summary judgment in lieu of complaint against defendants 1907 Southern 2007 LLC (Southern), Maykel Shamash, and Arash Gilardi pursuant to CPLR 3213. Plaintiff's motion is granted, on default, for the reasons that follow.

Factual Background & Procedural History

The court assumes familiarity with a related action brought by plaintiff against the two individual defendants and another corporate defendant under Index No. 651498/2013 (the Related Action). In an order dated July 3, 2013, the court granted plaintiff's motion for summary judgment in lieu of complaint, on default, in the Related Action. Shortly thereafter, this court was prepared to grant the instant motion, but noticed that plaintiff failed to file an affidavit of service for the corporate defendant, Southern. The court therefore held this motion in abeyance pending the filing of the affidavit of service to allow time for Southern to respond.

On July 29, 2013, plaintiff filed an affidavit of service which states that Southern was served on July 18, 2013. None of the defendants, including Southern, ever filed an opposition to

the instant motion. Instead, on August 29, 2013, after defendants defaulted on this motion, defendants moved by order to show cause to vacate their default so that they could file opposition papers. On September 30, 2013, after holding a hearing, the court denied defendants' motion to vacate their default because, for the reasons stated on the record, there is no meritorious defense to plaintiff's claims. *See* NYSCEF Doc. No. 41 (Grey Sheet denying motion and hearing transcript).

As in the Related Action, Southern executed a Promissory Note (the Note) which was unconditionally guaranteed in writing by Shamash and Gilardi. The Note was dated February 22, 2007 and has a face value of \$550,000. On August 27, 2009, Southern executed and Shamash and Gilardi guaranteed a modification of the Note, whereby Southern agreed to make interest-only monthly payments of \$4,583.33 and pay back the \$550,000 on August 22, 2010. Plaintiff has the right to declare the Note in default if defendants miss a monthly interest payment. The Note also provides for: (1) 4% annual interest upon default, which computes to \$60.27 per diem; and (2) a default late fee of \$0.04 for each dollar installment of the \$550,000, totaling \$22,000. The Rider to the Note also entitles plaintiff to recover his reasonable attorneys' fees from defendants in this action.

Defendants did not repay the principle amount on August 22, 2010, but continued to make monthly interest payments through November 2012. Defendants defaulted on December 22, 2012, when they failed to make a monthly interest payment. In a letter dated March 21, 2013, plaintiff gave defendants written notice of their default. Plaintiff commenced this action on May 13, 2013, by filing the instant motion for summary judgment in lieu of complaint, asserting a claim for (1) \$579,333.33, which includes the \$550,000 in principle, accrued interest,

and late fees through April 22, 2013; (2) default interest of 4% (\$60.27 per diem) from April 23, 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 evidence 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 and the personal guaranty. Defendants were duly served, but did not submit opposition papers. That being said, the court considered and rejected defendants' defenses at the hearing on September 30, 2013. Therefore, the court grants summary judgment to plaintiff against defendants in the amount of \$579,333.33 plus per diem interest of \$60.27 from April 23, 2013 to the date judgment is entered. The calculation of attorneys' fees is referred to a Special Referee to hear and report (unless plaintiff submits an affidavit waiving such amounts, at which time the Clerk will immediately be directed to enter judgment). Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint by plaintiff Joseph B. Sprung is granted against defendants 1907 Southern 2007 LLC, Maykel Shamash, and Arash Gilardi in the amount of \$579,333.33 plus per diem interest of \$60.27 from April 23, 2013 to the date judgment is entered; and it is further

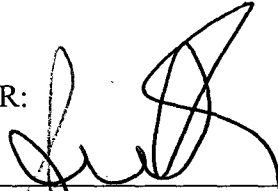
ORDERED that the calculation of plaintiff's attorneys' fees and litigation costs are referred to a Special Referee to hear and report with recommendations, unless the parties consent to a determination by the Special Referee, in which case the Special Referee may hear and determine said issues; and it is further

ORDERED that pending receipt of the report and a motion pursuant to CPLR 4403, final determination of that branch of the motion is held in abeyance, unless (1) the parties consent to a determination by the Special Referee; or (2) plaintiff waives his claim for attorneys' fees, which, if he does, shall submit an affidavit stating so and a proposed order directing the Clerk to enter judgement; and it is further

ORDERED that, if plaintiff does not waive such amounts, a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing before the Special Referee.

Dated: October 7, 2013

ENTER:



J.S.C.