SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD Justice PART 49

NEWMARK & COMPANY REAL ESTATE, INC. d/b/a NEWMARK GRUBB KNIGHT FRANK and NEWMARK BUILDING SERVICES, LLC,

Plaintiffs,

-against-

ROBERT J. BRENNAN,

Defendant.

INDEX NO. 651589/2012

MOTION DATE Dec. 19, 2013

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for summary judgment in lieu of complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion for summary judgment in lieu of complaint is decided in accordance with the accompanying decision and order.

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

Dated: December 24, 2013

O. PETER SHERWOOD, J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION PART 49

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Plaintiffs,

-against-

ROBERT J. BRENNAN,

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DECISION AND ORDER

Index No. 651589/2012
Mot. Seq. 002

O. PETER SHERWOOD, J.:

Plaintiffs, Newmark & Company Real Estate, Inc. ("Newmark") and Newmark Building Services, LLC ("NBS"), move, pursuant to CPLR 3213 for summary judgment in lieu of complaint. For the following reasons, the motion for summary judgment in lieu of complaint must be denied.

I. Background

Defendant, Robert J. Brennan ("Brennan") entered into an Independent Contractor Agreement ("ICA") with Newmark, a real estate brokerage, on June 11, 2008. Newmark and its affiliate, NBS, extended a series of loans and other payments to Brennan, evidenced by promissory notes, which contemplated repayment from commissions earned by Brennan at his previous employment as well as during his employment at Newmark. On July 14, 2011, Brennan terminated the ICA and began employment with another real estate brokerage. This litigation to recover the funds followed.

A. The Execution Bonus

The ICA provided for a $275,000.00 "Execution Bonus," which Newmark paid to Brennan. The ICA also contemplated that if Newmark terminated the ICA prior to its initial expiration (July 7, 2013) for reasons other than Cause, Brennan was obligated to repay the Execution Bonus. Newmark does not argue that the ICA is an "instrument for the payment of money only." As such, to the extent that Newmark seeks to recoup the Execution Bonus, summary judgment in lieu of complaint is an inappropriate means to do so.

B. The Insurance Premiums

The ICA also provided for Newmark to pay Brennan's health and dental insurance premiums, so long as Brennan booked at least $125,000 in net commissions each year. Newmark seeks to recover $5,364.97 in these premiums, Brennan having failed to meet the target. As with the Extension Bonus, recovery of the insurance premiums is not recovery on an "instrument for the payment of money only."

C. The Newmark Note

On July 7, 2008, Newmark and Brennan executed a Loan Agreement and Promissory Note in the amount of $300,000 (the "Newmark Note") (Rader aff Ex. B). Brennan was to repay the Note by remitting payments from his former employer (Cushman & Wakefield, Inc.) in connection with booked and pending transactions. On the maturity date, July 6, 2011, Brennan was obligated to repay any amount still owed under the Note. Interest on the Note was calculated based on the Prime rate fixed on the date principal was paid to Brennan.

Termination of the ICA constituted an Event of Default on the Newmark Note and accelerated the maturity date. Because the ICA was terminated on July 14, 2011, eight days after the maturity date, this provision is irrelevant.

Annexed to the Newmark Note is an agreement, dated October 5, 2009, which shows monies due to Brennan from Cushman & Wakefield. Notably, the agreement also confirms that Newmark had loaned Brennan $90,000 (instead of $300,000) under the Newmark Note. Although Newmark loaned Brennan $300,000 under the Newmark Note (Rader aff ¶ 11), Brennan owed only $96,778.70 as of July 25, 2011 ($90,000 principal plus $6,778.70) (Rader aff ¶ 30). Newmark provides no evidence of any credits on the Note.

D. The NBS Notes

NBS and Brennan executed three Loan Agreements and Promissory Notes. The first was executed on October 7, 2009 in the amount of $50,000. The second was executed on March 5, 2010 in the amount of $60,000. The third was executed on September 10, 2010 in the amount of $25,000 (collectively the "NBS Notes"). The terms of the NBS Notes are materially identical to the Newmark Note with the exception that the primary method of repayment of the NBS Notes was the assignment of Brennan's current commissions under the ICA.

E. Brennan Leaves Newmark

On July 14, 2011, Brennan terminated the ICA and began employment with another real estate brokerage. Pursuant to the ICA, Newmark elected to apply $85,126.21 in commissions owed to Brennan to repay the Execution Bonus, rather than the Notes. Newmark also demanded repayment of $96,778.70 on the Newmark Note, and $52,876.03, $62,655.21, and $25, 685.62 on each the NBS Notes, respectively for a sum total of $141,216.85 due to NBS. Newmark also demanded $189,873.79 in repayment of the Execution Bonus ($275,000.00 less $85,126.21 in commissions).

F. Procedural History

Newmark filed the instant action on May 9, 2012. By order dated July 17, 2013, the Court denied the motion for summary judgment in lieu of complaint but with leave to renew (NYSCEF Doc. No. 15). Plaintiffs filed a renewed motion for summary judgment in lieu of complaint on August 19, 2013. Brennan filed an opposition on August 29, 2013. Brennan submits an affidavit claiming an entitlement to $846,000 in commissions to satisfy payment on the Notes.

II. Discussion

Summary Judgment in Lieu of Complaint

CPLR 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and where the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, "other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; *Interman Indus. Products Ltd. v R.S.M. Electron Power,* 37 NY2d 151, 155 [1975]). An action on a promissory note is an action for payment of money only (*see Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968], *affd* 29 NY2d 617 [1971]; *see also Davis v Lanteri,* 307 AD2d 947 [2d Dept 2003]). The usual standards for summary judgment apply to CPLR 3213 motions. The instrument and evidence of failure to make payments in accordance with its terms constitute a prima facie case for summary judgment (*Weissman,* 88 NY2d at 444; *Matas v Alpargatas S.A.I.C.*, 274 AD2d 327 [1st Dept 2000]).

The case of *Tradition North America, Inc. v Sweeney* (133 AD2d 53 [1st Dept 1987]) is controlling. In that case, an employee signed six promissory notes that held out the possibility of being repaid by bonuses (*id.* at 53). In order to determine the amount payable, the court was required to look beyond the notes to determine the employee's entitlement to payments to offset the

obligations evidenced by the notes (*id.*). Even though the notes could have been satisfied by monetary payments, the employee did not make "an unconditional promise to pay a sum certain at a given time or over stated period" (*id.* at 53-54). Rather, he had the "option of performing work for his employer" to satisfy the debt. (*id.* at 54). The court considered the notes "alternatively as evidencing a loan obligation or an advance on bonus and indeed, nonbonus, compensation" (*id.*). The First Department concluded that "[w]hen what purport to be notes have such a hybrid dimension they ought not to be considered instruments for the payment of money only" (*id.*).

The Notes and insurance premiums do not qualify as instruments sued upon for the payment of money only. The motion for summary judgment in lieu of complaint is denied. The moving and answering papers shall be deemed the complaint and answer (with counterclaim) respectively. Counsel shall appear at a preliminary conference on Wednesday, January 29, 2014 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: December 24, 2013

ENTER,

O. PETER SHERWOOD
J.S.C.