

Kalai v BSD Telecom, Inc.

2014 NY Slip Op 31043(U)

April 17, 2014

Sup Ct, New York County

Docket Number: 159659/2013

Judge: Eileen A. Rakower

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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
PRESENT: Hon. EILEEN A. RAKOWER PART 15

Justice

DANIEL KALAI
Plaintiff,

INDEX NO. 159659/2013
MOTION DATE _____

- v -

MOTION SEQ. NO. 001

BSD TELECOM, INC. and JOEL SCHWARTZ,
Defendants.

MOTION CAL. NO. _____

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

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answer — Affidavits — Exhibits _____	3-4
Replying Affidavits _____	5

Cross-Motion: X Yes No

Plaintiff Daniel Kalai (“Plaintiff” or “Kalai”) moves for an Order, CPLR §3213, for summary judgment in lieu of a complaint against defendant BSD Telecom, Inc. (“BSD”) and Joel Schwartz (“Schwartz”)(collectively, “Defendants”) in the amount of \$25,024.49, together with interest and attorneys’ fees, in accordance with the terms of the terms of the promissory note (the “Note”), dated June 10, 2013.

Kalia submits an affidavit, in which he avers that in June 2013, Defendants delivered and executed the Note to him. Annexed to Kalia’s affidavit is a copy of the Note.

Kalia avers that he had agreed to lend Defendants’ money to be used to pay BSD’s bills and other operating expenses. The Note was executed by Schwartz, in his capacity as President of BSD, and individually. The Note provides that Defendants are jointly and severally liable for payment of the Note. The Note further provides for one payment of principal and accrued interest on August 1, 2013. Kalia avers that Defendants did not make any payments of the principal balance of the Note or accrued interest at the Maturity Date, and that despite demand, Defendants owe \$25,024.34.

Defendants cross move for an Order pursuant to CPLR §7503 staying this action and compelling resolution of this matter before the American Arbitration

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

J.S.C.

Association pursuant to BSD's shareholder agreement, or alternatively, disqualifying Plaintiff's counsel based on a conflict of interest.

With respect to the Note, Defendants state that while the Note set forth an obligation to pay the principal amount of \$29,600.30, Plaintiff advanced to Defendants only \$24,600.30. Defendants do not dispute the Maturity Date was August 1, 2013, although they contend that Plaintiff agreed to accept "regular periodic payments until the Note was paid in full." Defendants state that they made a payment on the Note in the sum of \$1,500 thereafter. Defendants do not dispute they have not paid the remaining amount owed.

Defendants contend that they are entitled to a right of set-off based on Plaintiff's breach of its fiduciary duty and tortious interference with BSD's contractual and business relations and resulting damages to BSD.

CPLR §3213 states, in relevant portion:

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. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion ...

CPLR §3213 applies "if a prima facie case would be made out by the instrument and a failure to make the payment called for by its terms." (*Weissman v. Sinorm Deli*, 88 NY2d 437, 444[1996]).

In an action to recover on a promissory note, the plaintiffs establish a prima facie case by submitting proof of the note and of the defendants' default. (*Bank of NY v. Sterlington Common Assocs.*, 235 AD2d 448 [2d Dept 1987]). It is then incumbent on defendants to come forward with proof of evidentiary facts showing the existence of a triable issue of fact with respect to a bona fide defense. (*Colonial Commercial Corp. v. Breskel Assocs.*, 238 AD2d 539 [2d Dept 1997]).

Here, Plaintiffs have made a prima facie showing of their entitlement to summary judgment on the Note. Through the affidavit of Daniel Kalia and the production of the Note signed by Defendants, Plaintiffs have submitted proof of the note and Defendant's default. Defendants have failed to raise any material issue of fact concerning the Note and their default.

The Note does not contain an arbitration clause and further provides, in relevant part, "BORROWER AND EACH INDORSE ALSO WAIVE (1) THE

RIGHT TO INTERPOSE ANY DEFENSE BASED UPON ANY CLAIMS OR SET-OFF OR COUNTERCLAIM OF ANY NATURE OR DESCRIPTION, (II) ANY OBJECTION BASED ON FORUM NON CONVENIENS OR VENUE.”

Additionally, the Note states in relevant part:

The liability of any Borrower or indorser hereunder shall be unconditional and shall not be in any manner affected by the indulgence whatsoever granted or consented to by the holder hereof, including, but not limited to any extension of time, renewal, waiver or other modification . . . No amendment, modification or waiver of any provision of this Note nor consent to any departure by Borrower therefrom shall be effective, irrespective of any course of dealing, unless the same shall be in writing and signed by the Bank, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given. This Note cannot be changed or terminated orally or by estoppel or waiver or by any alleged oral modification regardless of any claimed partial performance referable thereto.

Wherefore it is hereby,

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

ORDERED that the Clerk enter judgment in favor of Plaintiff Daniel Kalai and against defendants BSD Telecom, Inc. and Joel Schwartz in the amount of \$25,024.34, together with interest prayed as allowable by law (at the rate of 9% per annum) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the amount of reasonable attorneys' fees and costs under the governing agreements is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendants, of the date of the hearing; and it is further

ORDERED that Defendants' cross motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: APRIL 17, 2014


HON. EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE