

Blandi v TPR Holdings LLC

2014 NY Slip Op 32262(U)

August 19, 2014

Supreme Court, New York County

Docket Number: 651272/2014

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
COUNTY OF NEW YORK: PART 54

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OSCAR BLANDI, individually and as agent for
LOUIS J. ROTUNDI, GINA BERTOLOTTI,
and GINA LOMBARDI,

Index No.: 651272/2014
DECISION & ORDER

Plaintiff,
-against-

TPR HOLDINGS LLC,
Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff Oscar Blandi moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendant TPR Holdings LLC (TPR). Plaintiff's motion is granted, on default, for the reasons that follow.

On April 24, 2014, Blandi commenced this action to recover on two promissory notes issued by TPR on June 14, 2011. The notes are governed by New York law and provide that TPR consents to this court's jurisdiction.

The first note is for \$2 million, collectively payable to Blandi and non-parties Louis J. Rotundi, Gina Bertolotti, and Gina Lombardi. In section 10.1, Blandi is appointed the agent of Rotundi, Bertolotti, and Lombardi, and he is authorized to enforce the note on their behalf. The second note is for \$250,000, payable to Blandi. The notes have a 5% interest rate, which increases to 10% upon default. The notes' maturity date is June 14, 2016. Section 8.3 of the notes provides that TPR must pay Blandi's costs and legal fees incurred in enforcing the notes.

On January 15, 2014, TPR defaulted on both notes by missing a scheduled payment. In a letter dated March 28, 2014, Blandi gave TPR written notice of default and accelerated the

remaining amounts due pursuant to section 7.2. Blandi claims that \$968,781.25 is due on the first note and \$126,563 is due on the second note. Blandi also seeks default interest from April 11, 2014.

Blandi filed the instant motion for summary judgment in lieu of complaint on May 9, 2014. TPR was served. Blandi and TPR stipulated to extend TPR's deadline to oppose the motion on four occasions. The latest stipulation requires opposition to be filed by August 6, 2014. No opposition was filed by that date. TPR, therefore, is in default.

"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).

Blandi established his *prima facie* case by submitting evidence of TPR's default on its obligations under the notes. TPR was duly served, but did not submit opposition papers. Summary judgment, therefore, is granted to Blandi. The calculation of Blandi's costs and attorneys' fees is referred to a Special Referee to hear and report. Judgment shall be entered after the Referee's report is confirmed, unless Blandi waives his claim for costs and legal fees beforehand, in which case judgment will be directed to be entered upon Blandi's submission of (1) an affidavit waiving such amounts; and (2) a proposed judgment on notice. Accordingly, it is


ORDERED that the motion for summary judgment in lieu of complaint by plaintiff Oscar Blandi is granted on default against defendant TPR Holdings LLC in the amount of \$1,095,344.25 plus default interest of 10% from April 11, 2014; and it is further

ORDERED that the calculation of Blandi's costs and attorneys' fees, pursuant to section 8.3 of the notes, is respectfully referred to a Special Referee to hear and report; 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 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: August 19, 2014

ENTER:



J.S.C.