

Goldberger v Magid
2015 NY Slip Op 30149(U)
February 5, 2015
Supreme Court, New York County
Docket Number: 652404/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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JUDY GOLDBERGER,

Plaintiff,

Index No.
652404/2014

Decision and
Order

- against -

Mot. Seq. 001

ILYA MAGID and FLORA MAGID,

Defendants.

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

Plaintiff Judy Goldberger (“Plaintiff” or “Goldberger”) moves, pursuant to CPLR § 3213, for summary judgment in lieu of complaint against defendants, Ilya Magid (“Ilya”) and Flora Magid (“Flora”) (and together, collectively, “Defendants” or “the Magids”), jointly and severally, in the amount of \$427,500.00. Plaintiff claims that Defendants are in default of their respective obligations under a promissory note (the “Promissory Note”) between Plaintiff and Ilya, obligating Ilya to pay Plaintiff the principal amount of \$300,00.00, with interest thereon payable on a monthly basis (commencing in May 2011) at the rate of 15% per annum, and a guaranty agreement (the “Guaranty”), between Plaintiff and Flora, guaranteeing Ilya’s obligations under the Promissory Note.

Plaintiff submits the affidavit of Goldberger, dated July 30, 2014; and, a copy of the Guaranty, dated April 21, 2011. Annexed to Plaintiff’s reply papers are copies of two checks payable to Ilya Magid in the amounts of \$138,946.79 and 4,851.02, respectively; a copy of Plaintiff’s calculation of monies owed; and, a copy of Count 2 in the criminal indictment of Plaintiff’s husband, Samuel Goldberger.

Defendants oppose. Defendants submit the affidavit of Ilya, dated November 12, 2014; and, the affidavit of Flora, dated December 23, 2014.

CPLR § 3213 provides that, “[w]hen 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.” A document comes within CPLR § 3213 “if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms.” (*Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 [1996] [internal citations omitted]). By contrast, the 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.*). The test “is not what the instrument may be reduced to by part performance or by elision of a portion of it ... but rather how the instrument read in the first instance.” (*Weissman*, 88 N.Y.2d at 445).

An unconditional guaranty may constitute an instrument for the payment of money only, for purposes of an accelerated judgment under CPLR 3213. (*Acadia Woods Partners, LLC v. Signal Lake Fund LP*, 102 A.D.3d 522, 522-23 [1st Dep’t 2013]). To demonstrate entitlement to recover on a personal guaranty, a plaintiff must present evidence of the guaranty, the amount of the debt guaranteed, and defendants’ default. (*Carrera Casting Corp. v. Cord*, 106 A.D.3d 422 [1st Dep’t 2013]).

Flora avers that she did not sign the Guaranty. In the affidavit of Ilya, Ilya avers that Ilya was an unlicensed broker who delivered checks to Plaintiff’s husband, Samuel “Benzi” Goldberger, who has pleaded guilty to controlling an unlicensed money transmitting business, in *United States v. Goldberger*, S.D.N.Y., No. 12-CR-581, Docket #103. Ilya further avers that, “[Ilya has] pleaded guilty to structuring the transactions in order to evade reporting requirements. [Ilya’s] case is sealed, and [Ilya is] waiting to be sentenced.”

Ilya avers that the checks he delivered to Benzi as an unlicensed broker include the checks attached to the Promissory Note. In addition, Ilya avers:

Sometime in March 2011, Benzi called me and asked me to meet. . . . During that meeting, Benzi showed me several checks that he had received from me as a broker and that the payors’ banks had not honored, because the payors did not have sufficient funds in their accounts. Benzi told me that he was afraid that the bad checks would lead his bank to refuse service to his check cashing business. Benzi also told me that his family provided the financial backing for the business. Further, he stated that he needed to show his

family that he was trying to recover the money that he had lost by cashing the bad checks.

Ilya avers that, “[a]s a solution, Benzi asked [Ilya] to sign a promissory note for an amount that would cover the sum of the amounts of the bad checks.” Ilya also avers:

Benzi promised that he would not enforce such a note. Rather, he explained, he needed me to show his family a promissory note as evidence that he was trying to recover the lost money from the bad checks. Also, Benzi said that we would continue to do business together for a long time and that I could repay him some of the money out of my future commissions.

The affidavit of Ilya further states that, “In April 2011. . . [Benzi] showed [Ilya] the promissory note and asked [Ilya] to sign it, which [Ilya] did.” Ilya further avers, “Also, at Benzi’s request, I signed my wife Flora’s name on the guarantee that is attached to the promissory note. I did not tell my wife anything about the promissory note until this lawsuit was filed.”

Here, Plaintiff fails to meet her burden of demonstrating her entitlement to summary judgment in lieu of complaint. With respect to the Promissory Note, Plaintiff does not submit a copy of the Promissory Note in her moving papers. As a result, to the extent that Plaintiff’s motion seeks summary judgment on the Promissory Note, Plaintiff does not present sufficient evidence of the Promissory Note to warrant an accelerated judgment under CPLR § 3213. In addition, Defendants raise questions of fact as to whether the Promissory Note is supported by lawful consideration.

As far as Plaintiff’s motion for an accelerated judgment on the Guaranty is concerned, absent the Promissory Note, Plaintiff also fails to meet her burden to present evidence of the amount of the debt guaranteed under the Guaranty. Moreover, Defendants raise questions of fact as to whether Flora executed the subject Guaranty, thereby creating an issue of fact as to Guaranty’s enforceability. In light of the foregoing, Plaintiff’s entitlement to the amounts represented by the Guaranty cannot be determined without reference to outside proof extrinsic to the Guaranty. Accordingly, Plaintiff’s motion for summary judgment in lieu of complaint is denied and the parties are directed to proceed with litigation as set forth below.

Wherefore, it is hereby

ORDERED that Plaintiff's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED the Plaintiff's moving papers, consisting of a notice of motion, the affidavit of Plaintiff in support of Plaintiff's motion, and the reply affidavit of Plaintiff in further support of Plaintiff's motion for summary judgment in lieu of complaint, are hereby deemed the complaint in this action and the Defendants' answering papers, consisting of the affidavit of Ilya and the affidavit of Flora, are hereby deemed the answer; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 205, 71 Thomas Street, on May 12, 2015, at 9:30 AM.

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

Dated: January 30, 2015

JAN 30 2015



Eileen A. Rakower, J.S.C.