

Gladstein v Keane

2015 NY Slip Op 31043(U)

June 17, 2015

Supreme Court, New York County

Docket Number: 152121/15

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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HARVEY GLADSTEIN,

Plaintiff,

Index No. 152121/15

-against-

DECISION/ORDER

THOMAS F. KEANE and SUSAN KEANE,

Defendants.
-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmation in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Harvey Gladstein commenced the instant action pursuant to Civil Practice Law and Rules ("CPLR") § 3213 with a summons and notice of motion for summary judgment in lieu of complaint against defendants Thomas F. Keane and Susan Keane to recover the principal amount of \$174,000.00 with interest thereon from February 2, 2015 plus attorney's fees. Plaintiff alleges that this action is based upon an instrument for the payment of money only and that there is no defense thereto. Defendants oppose the motion on the ground that a material issue of fact exists as to whether the instrument has been partially pre-paid. For the reasons set forth below, plaintiff's motion is granted.

The relevant facts are as follows. Both plaintiff and defendant Thomas Keane were partners in the law firm Gladstein, Keane & Flomenhaft PLLC ("GKF"). In or around July 2012, defendants executed a promissory note in the amount of \$180,000.00 in favor of plaintiff pursuant

to which defendants were to make thirty monthly payments of \$6,000 “[c]ommencing on the first day of the month, after thirty (30) days of...(i) the retirement from the practice of law by the Payee (as evidenced in the sole discretion of the Payee, by written notice...)” (the “Note”). The Note further provides that the full amount will become due, upon the declaration and at the option of the plaintiff, if defendants fail to pay any installment within ten days after its due date.

It is undisputed that plaintiff retired from GKF in September 2014 and that he advised Mr. Keane that he expected repayment of the loan to commence immediately. In November 2014, defendants made a single payment to plaintiff in the amount of \$6,000 and thereafter, notified plaintiff that they would not be making any further additional installment payments. On or about December 19, 2014, plaintiff provided defendants with written notice of his retirement. Additionally, by letter dated February 3, 2015, plaintiff declared the Note accelerated and the full amount due on the Note.

Pursuant to CPLR § 3213, “[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.” “In order to qualify for CPLR § 3213 treatment, plaintiff must be able to establish a *prima facie* case by proof of the agreement and a failure to make the payments called for thereunder.” *SCP (Bermuda) Inc. v. Bermudatel Ltd.*, 224 A.D.2d 214, 216 (1st Dept 1996). “A defendant can defeat a CPLR § 3213 motion by offering evidentiary proof sufficient to raise a triable issue of fact.” *See Banco Popular N. Am. v. Victory Taxi Mgt.*, 1 N.Y.3d 381, 383 (2004). However, “bald, conclusory assertions” by themselves are insufficient as the evidentiary proof required to raise a triable issue of fact. *Bronsnick v. Brisman*, 30 A.D.3d 224 (1st Dept 2006). Further, “[a] party opposing summary

judgment may proffer hearsay evidence, but such proof may not be the sole factual basis for denying summary judgment.” *Andron v. Libby*, 120 A.D.3d 1056, 1057 (1st Dept 2014); *see also Navedo v. 250 Willis Ave. Supermarket*, 290 A.D.2d 246, 247 (1st Dept 2002)(“[h]earsay evidence may be sufficient to demonstrate the existence of a triable fact where it is not the only evidence submitted.”)

In the instant action, plaintiff has established his *prima facie* entitlement to summary judgment against defendants as he has demonstrated the existence of the Note between plaintiff and defendants for the payment of money only and it is undisputed that defendants have failed to make certain payments called for under the Note.

In response, defendants have failed to raise an issue of fact sufficient to defeat plaintiff’s motion. Defendants’ assertion that summary judgment should be denied because there exists an issue of fact as to whether a portion of the Note has been pre-paid is without merit. Specifically, defendants provide the affidavit of Mr. Keane, who affirms as follows. Mr. Keane purchased a major portion of GKF from plaintiff, a portion of which was allocated to cover plaintiff’s expenses and another portion of which was allocated to cover plaintiff’s salary. Plaintiff would regularly submit his expenses to the office manager, who would pay them without question. Approximately eighteen months after said arrangement began, Mr. Keane was informed by the firm’s accountant, Mark Rosman, that plaintiff had put in for expenses and received more than the amount he was entitled to under the agreement, specifically receiving in excess of more than \$120,000. Mr. Keane told Mr. Rosman that because he owed plaintiff \$180,000, he would not seek repayment of the overpayments made to plaintiff but that said overpayments would offset the loan made under the Note instead. Mr. Rosman then communicated the issue of the overpayment and Mr. Kean’s

agreement not to seek repayment to plaintiff, who did not object. Thus, defendants assert that based on the over \$120,000 paid to plaintiff in overpayments, plaintiff has, in effect, received at least 25 months' worth of installment payments, making the next payment of \$6,000 due on March 1, 2017.

However, Mr. Keane's affidavit is insufficient to raise an issue of fact to defeat plaintiff's motion. As an initial matter, Mr. Keane's assertions are merely self-serving and conclusory and he offers no evidence in support thereof. Indeed, Mr. Keane has offered no evidence that the alleged overpayments made to plaintiff were to offset the loan plaintiff made to defendants pursuant to the Note but only that he wanted to treat them as such. Additionally, Mr. Keane relies on hearsay evidence, which, by itself cannot be the sole factual basis for denying summary judgment. Mr. Keane could have provided the affidavit of Mr. Rosman, affirming that he informed plaintiff of the overpayments and that said overpayments would offset the loan made under the Note. However, no evidence other than the conclusory statements made by Mr. Keane in his affidavit has been provided to the court. As plaintiff has demonstrated the existence of the Note between plaintiff and defendants for the payment of money only and it is undisputed that defendants have failed to make certain payments called for under the Note, plaintiff's motion must be granted.

Accordingly, it is hereby

ORDERED that plaintiff's motion for an Order pursuant to CPLR § 3213 granting him summary judgment in lieu of a complaint against defendants is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the principal amount of \$174,000.00 with interest thereon at the rate of 9% from February 2, 2015; and it is further

