

Kriegel v Dearden

2015 NY Slip Op 31087(U)

June 23, 2015

Supreme Court, New York County

Docket Number: 153598/15

Judge: Cynthia S. Kern

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

-----X
PEGGY G. KRIEDEL REVOCABLE TRUST UNDER
DEED,

Plaintiff,

Index No. 153598/15

-against-

DECISION/ORDER

KENNETH DEARDEN,

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
Notice of Cross-Motion and Affidavits Annexed.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Peggy G. Kriegel Revocable Trust Under Deed (the “Trust”) 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 defendant Kenneth Dearden to recover the principal amount of \$233,000.00 with interest thereon from February 1, 2015 plus post-judgment interest and 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. Defendant cross-moves for an Order pursuant to CPLR § 2201 staying this action pending the impleader of a third-party. For the reasons set forth below, plaintiff’s motion is granted and defendant’s cross-motion is denied.

The relevant facts are as follows. On or about February 1, 2012, defendant executed a promissory note in favor of his mother-in-law, Peggy G. Kriegel (“Kriegel”), in the principal amount of \$261,000.00 (the “Note”). On or about October 10, 2013 Kriegel assigned the Note to

plaintiff by assignment of promissory note (the "Assignment"). The Note was due and payable in full on January 31, 2015. However, prior to the Note becoming due, the following amounts of principal were forgiven: (i) \$14,000.00 on or about February 1, 2013; and (ii) \$14,000.00 on or about February 1, 2014 (the "Debt Forgiveness"). After taking into account the Debt Forgiveness, the remaining principal balance of the Note is \$233,000.00 and plaintiff asserts that defendant has failed to pay any of said balance or interest currently due under the Note and that defendant has no defense thereto.

The court first turns to defendant's cross-motion for an Order pursuant to CPLR § 2201 staying this action. Pursuant to CPLR § 2201, "the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." Here, defendant seeks a stay of this action so that he can implead his wife, Emily Kreigel Dearden ("Emily"), in the action as he asserts that she is a necessary party. Specifically, he alleges that Emily is a necessary party because although she was not a party to the Note, the debt owed by defendant under the Note is "marital property" and thus, she must be a part of this action. However, it is undisputed that the Note was executed solely between plaintiff and defendant. Thus, defendant must pay the debt owed to plaintiff pursuant to the Note. To the extent defendant asserts that Emily must share in the debt owed to plaintiff, defendant may only seek such relief in an action brought in matrimonial court.

The court now turns to plaintiff's motion for an Order pursuant to CPLR § 3212 for summary judgment in lieu of complaint. 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).

In the instant action, plaintiff has established its *prima facie* entitlement to summary judgment against defendant as it has demonstrated the existence of the Note between plaintiff and defendant for the payment of money only and it is undisputed that defendant has failed to make certain payments called for under the Note. In response, defendant has failed to raise an issue of fact sufficient to defeat plaintiff’s motion. Accordingly, it is hereby

ORDERED that defendant’s cross-motion for an Order pursuant to CPLR § 2201 staying this action is denied; and it is further

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

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the principal amount of \$233,000.00 with interest thereon at the rate of 0.19% from February 1, 2015; and it is further

ORDERED that that portion of plaintiff’s motion which seeks post-judgment interest is denied as premature as no judgment has yet been entered in this action; and it is further

ORDERED that the portion of plaintiff’s action that seeks the recovery of attorney’s fees is severed and the issue of the amount of reasonable attorney’s fees plaintiff may recover against the defendant is referred to a Special Referee to hear and report. Within thirty (30) days from the date

