

Murray Hill Props., LLC v Silver
2015 NY Slip Op 32267(U)
November 30, 2015
Supreme Court, New York County
Docket Number: 651855/2015
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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MURRAY HILL PROPERTIES LLC,

Plaintiff,

Index No.
651855/2015

**DECISION AND
ORDER**

- against -

Mot. Seq. #001

MARK SILVER,

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

Plaintiff, Murray Hill Properties LLC (“Plaintiff” or “MHP”), moves, pursuant to CPLR § 3213, for summary judgment in lieu of complaint against defendant, Mark Silver (“Silver”) in the amount of \$105,930.73 with interest thereon from May 28, 2015, plus costs and attorneys’ fees. Silver opposes.

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). To prevail on a motion for summary judgment in lieu of complaint under CPLR § 3213, the plaintiff must present proof of the “instrument for the payment of money only” and evidence of the defendant’s failure to make the payment called for by the instrument’s terms. (*Matas v. Alpargatas S.A.I.C.*, 274 A.D.2d 327, 328 [1st Dep’t 2000]).

Plaintiff submits the affidavit of David Greene, president of Brokerage Services at MHP and a copy of the Promissory Note dated March 21, 2014, entered between MHP, as Holder, and MHP, as Borrower, in the amount of \$135,513.14. Pursuant to the terms of the Promissory Note, "Borrower agrees to pay all expenses of Holder in collecting this Note, including without limitation, reasonable attorneys' fees and expenses." Plaintiff also provides a "Broker's Statement" from 2015 showing the amount due under the Promissory Note.

Plaintiff is a real estate brokerage which provides services for commercial clients. Between December 2012 and May 2014, Silver was affiliated with MHP as a real estate sales person. Plaintiff claims that during that period, "Silver received advances in excess of \$10,000 per month on account of brokerage commissions he believed he would be earning, with each such advance being reflected on a cumulative basis by a promissory note, the last of which is the note sued upon." Plaintiff claims, "Mr. Silver ceased being affiliated with Murray Hill Properties in July, 2014, and never, in fact, made any commissions from which he could repay the loan." Plaintiff claims that Silver repaid some portion of the loan, but that \$105,930.77 remains due and owing under the loan.

In opposition, Silver submits an affidavit. Silver avers that he joined MHP as a commercial real estate broker in 2012. Silver states that for the first year he was at MHP, he "received a draw each month, for which MHP required [him] to sign a promissory note." In 2014, MHP advised Silver that it was reducing his draw. Silver states,

At the time MHP paid me my monthly draw in March 2014, it apparently had me sign a promissory note for approximately \$135,000, instead of providing me with the usual monthly a [sic] promissory note, non-aggregated, for the monthly draw amount. MHP never alerted me to this different amount, or explained to me that it was asking me to sign a promissory note for this amount.

Silver's relationship with MHP was terminated in June 2014. Thereafter, Silver joined DTZ, a commercial real estate brokerage firm, as broker. Silver was terminated from DTZ in April 2015.

On July 24, 2014, Silver emailed Mr. Sturner, MHP's Principal/COO, "a proposed repayment plan for the money that I owe MHP." The "proposed repayment plan" provided that Silver would pay MHP the following: "a fixed amount of \$1,200/month," "50% of any deals that are on 'MHP termination transaction list,'" and "20% of any DTZ deals that close providing Mark's DTZ draw is met." Silver, wrote, "This offer is what I could afford. Unfortunately, I don't have a lump sum of money where I could write a check to MHP. However, as deals closed in the future I'll be happy to repay MHP through those closed deals as indicated above."

On July 25, 2014, Mr. Sturner responded to Silver's email. Mr. Sturner wrote, in part:

1. We can accept this amount if we understand what you are collecting monthly from the new draw.
2. Since it was your position that you had no deals to speak of but this list is all of a sudden viable We must ask to keep most if not all of these deals and charge 100% against your debt.
3. This item is contingent on how much we have collected from 1 & 2 although our first thought was 1/3.

On July 29, 2014, Silver replied to Mr. Sturner's email and provided information concerning his draw and additional comments.

On July 29, 2014, Mr. Sturner replied, "We agreed to your terms and [of] course [they] will remain confidential if all terms are met as gentlemen." On July 29, 2014, Silver replied, "Thank you for agreeing with the repayment terms."

Silver claims in accordance with the agreed upon payment plan, Silver made his first monthly payment of \$1,200 each month, and has not missed a payment. Silver claims he mailed each of the checks for payment to Mr. Sturner's attention at MHP, and MHP did not object to any of Silver's payments. Silver claims, "Any loan agreement I signed with MHP, to the extent enforceable, was modified and/or replaced by my subsequent written agreement with MHP, as memorialized in my correspondence with David Sturner, the owner and Chief Operating Officer of MHP, in July 2014."

Here, as there is an issue of fact concerning whether the emails exchanged between the parties in July 2014 constitute a modification to the Promissory Note or

a payment schedule of the debt due under the Promissory Note, Plaintiff's motion for summary judgment in lieu of complaint is denied.

Wherefore, it is hereby


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

ORDERED that Plaintiff's moving papers are hereby deemed the complaint in this action and Defendant's answering papers are hereby deemed the answer.

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

Dated: November 30, 2015

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Eileen A. Rakover, J.S.C.