

BGC Notes, LLC v Riffice
2016 NY Slip Op 30611(U)
April 8, 2016
Supreme Court, New York County
Docket Number: 653498/2015
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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BGC NOTES, LLC,

Plaintiff,

Index No.
653498/2015

**DECISION AND
ORDER**

- against -

Mot. Seq. #001

MICHAEL A. RIFFICE,

Defendant.

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

Plaintiff BGC Notes, LLC (“Plaintiff” or “BGC Notes”) moves for an Order pursuant to CPLR 3213 granting summary judgment in lieu of complaint in favor of plaintiff BGC Notes and against defendant Michael A. Riffice (“Riffice”), in the total sum of \$339,091.80, plus pre-judgment interest thereon, pursuant to CPLR 5001 and 5004, at a rate of 9% per annum, plus costs and fees.

In support of its motion, Plaintiff submits and affidavit of Dyanne Rosado, an authorized representative of BGC Notes, annexing the Cash AD and Note.

As averred to in Rosado’s Affidavit, Riffice began his employment with BGC Financial, L.P. (“BGC Financial”), an affiliate of BGC Notes, on May 2, 2012. Riffice’s employment agreement with BGC Financial (the “Employment Agreement”) set forth a five-year term of employment. On May 2, 2012, BGC Notes and Riffice also executed a Cash Advance Distribution Agreement (the “Cash AD”) and Promissory Note (the “Note”) whereby BGC Notes loaned Riffice the principal sum of \$462,000. The Note required Riffice to make quarterly interest payments at a rate of 1.30%, the Applicable Federal Rate for mid-term loans on May 31, 2012. The Note also required Riffice to pay principal and interest from distributions he expected to receive on his prospective limited partnership interests in BGC Holdings. Section 2 of the Note set forth various circumstances under which the loan would become “immediately repayable in its entirety to the Lender,” including if

Riffice “cease[d] to be a partner” in BGC Holdings, L.P. (the “Partnership”) at any time prior to the expiration of his Employment Agreement—*i.e.* May 2, 2017, the “Reference Date.” Riffice and BGC Note agreed to litigate any disputes arising out of the Note in the courts of the State of New York by summary judgment in lieu of complaint.

On October 9, 2014, BGC Financial terminated Riffice for cause effective immediately pursuant to sections 4(a)(i) and 7 of the Employment Agreement. As a result of Riffice’s termination, he ceased to be a partner in BGC Holdings, and the outstanding balance due under the Note became due and payable without notice or demand under the terms of the Note. BGC Notes demanded payment on the Note by letters dated November 21, 2014 and May 4, 2015. Pursuant to the terms of the Note, BGC Notes applied a total of \$48,984.69 in partnership distributions toward the balance due under the Note. Pursuant to section 5 of the Note, BGC Notes set off Non-Compete Payments pursuant to section 5(b) of the Employment Agreement against the outstanding balance due under the Note. The after tax net 6-month salary amount of \$88,548.00 was set off against the outstanding balance due under the Note.

In opposition, defendant argues that BGC Notes has failed to make a *prima facie* case to recover on the Note because the Note expresses a condition to payment and otherwise reflects a promise to pay an uncertain sum at an indefinite time, and that proof beyond the face of the instrument is required to make determinations about any payment obligation arising out of it.

Defendant submits the affirmation of William B. Fleming, which annexes: the Employment Agreement; the Cash AD and Note; a letter agreement dated May 2, 2012 governing Riffice’s grant of partnership interests in BGC Holdings; a letter dated November 21, 2014 from Kimberlee A. Malaska, Esq., Vice President and Assistant General Counsel for BGC Financial, L.P. and its affiliates demanding repayment of \$462,000; a letter from Malaska dated May 4, 2015 demanding repayment of \$312,000; Riffice’s termination letter dated October 9, 2014; and a copy of the Amended Statement of Claim filed by Riffice on October 1, 2015 with FINRA.

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). The instrument does not qualify if outside proof is needed, other than simply proof of nonpayment or a similar de minimis deviation from the face of the document. *Id.* (citations omitted).

To prevail on a motion for summary judgment in lieu of complaint arising out of a promissory note, “a plaintiff must show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note’s terms.” *Zyskind v. FaceCake Mktg. Tech., Inc.*, 101 A.D.3d 550, 551 (1st Dep’t 2012); *Matas v. Alpargatas S.A.I.C.*, 274 A.D.2d 327, 328 (1st Dep’t 2000). “A defendant can defeat a § 3213 motion by offering evidentiary proof sufficient to raise a triable issue of fact.” *Banco Popular N. Am. v. Victory Tax Mgmt.*, 1 N.Y.3d 381, 384 (2004).

Here, the repayment terms under the Note were directly related to Riffice’s Employment Agreement with BGC Financial and Riffice’s partnership agreement with BGC Holdings. Under section 1 of the Note, Riffice agreed to “repay the Loan (principal and interest) from the net Partnership distributions ... on all of the Maker’s Partnership units (including future units) in the Partnership ...” Thus, the principal amount of \$462,000 was to be reduced over the life of the loan by distributions paid on BGC Holding’s partnership units awarded to Riffice, which were uncertain at the time of the making of the Note.

Furthermore, Riffice’s repayment obligations were conditioned upon whether or not Riffice completed his five-year employment term with BGC Financial under the Employment Agreement. Section 1 of the Note expressly provides:

In the event that any portion of the Loan remains unpaid on such date as Maker ceases to be a Partner, the Lender will not seek to recover the remaining unpaid portion of the Loan ... if the Maker remained a current partner in the Partnership and did not breach any of his or her obligations owed to the Partnership or any Affiliate through ... the Employment Agreement expiration date[.]

As provided in section 2 of the Note, if the Maker “ceases to be a Partner” prior to the expiration of the Employment Agreement, “the Loan shall become immediately due and payable to the Lender, without notice or demand.”

Because the Note does not express an “unconditional” obligation to repay, does not call for payment of a sum certain to be paid at a definite time, and the sums

owed under the Note are not ascertainable without reference to other employment-related agreements, the Note is not “an instrument for the payment of money only” and thus ineligible for CPLR 3212 treatment. Plaintiff’s claims based upon the Note require reference to proof beyond the face of the instrument to make determinations about any payment obligation arising out of it. *Weissman*, 88 N.Y.2d at 444.

Wherefore, it is hereby

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


ORDERED that the Plaintiff’s moving papers, consisting of a notice of motion and the affidavit of Dyanne Rosado in support of Plaintiff’s motion, are hereby deemed the complaint in this action; and it is further

ORDERED that Defendant shall move or serve an answer to the complaint within 20 days from the date of this Order.

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

Dated: APRIL 8, 2016

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Eileen A. Rakower, J.S.C.