

Bartolucci v Nicholls
2016 NY Slip Op 31067(U)
February 19, 2016
Supreme Court, New York County
Docket Number: 161101/2013
Judge: Ellen M. Coin
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: ELLEN M. COIN, Justice

PART: 63

Marissa Bartolucci

INDEX NO.: 161101/2013

MOTION DATE: Feb. 17, 2016

MOTION SEQ. NO.: 002

-v-

David Shaw Nicholls

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause—Affidavits—Exhibits _____	No(s) <u>1</u>
Answering Affidavits—Exhibits _____	No(s) <u>2</u>
Replying Affidavits _____	No(s) <u>3</u>

Plaintiff has moved for summary judgment pursuant to CPLR 3212 on her first four causes of action for payment on a note, breach of contract for failure to maintain collateral securing the note and conversion of the collateral. The fourth cause of action merely appears to restate the third cause of action for conversion. Plaintiff also seeks punitive damages and collection costs, including reasonable attorney's fees.

On a motion for summary judgment, the moving party has the initial burden to show its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to demonstrate the absence of any material issues of fact (See CPLR 3212 (b); *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562

[1980]). Once such showing is made, the burden then shifts to the opposing party to establish, also by submitting evidentiary proof in admissible form, that genuine material issues of fact exist which require a trial of the action (See *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Alvarez*, 68 NY2d at 324).

Plaintiff has established prima facie entitlement to summary judgment by submitting, as relevant, the sued-upon note, plaintiff's supporting affidavit and a letter dated October 30, 2013, notifying defendant of the default under the note. In opposition, defendant failed to offer evidentiary proof in admissible form to raise an issue of fact, as defendant's opposition was not submitted by means of an affidavit. Defendant failed to appear at the initial oral argument date of December 2, 2015 and requested an adjournment to March 15, 2016 on the ground that he was tied up with work in Italy and would not be able to return to the United States until the end of January 2016. The Court granted defendant's request in part, adjourning oral argument to February 17, 2016.

The Court also instructed defendant that as an alternative to submitting an affidavit, defendant could instead submit an affirmation pursuant to CPLR 2106 (b) as a person located outside the geographic boundaries of the United States or its possessions.

Defendant has failed to supplement his papers and did not appear for oral argument on the adjourned date.

In accordance with the foregoing, it is hereby

ORDERED that the Clerk of Court shall sever the first cause of action and enter judgment thereon in the amount of \$50,000.00, together with interest at the rate of 2.75% per annum plus \$28.00 per month from January 1, 2013 to November 31, 2015, and at the rate of 6% per annum thereafter, as calculated by the Clerk and costs as taxed by the Clerk, and plaintiff shall have execution therefor; and it is further

ORDERED that the second and third causes of action, together with the claim for collection of plaintiff's reasonable attorney's fees, are severed, and plaintiff shall file a note of issue and certificate of readiness within 60 days from the date of this order and schedule an inquest on notice to determine the amounts of recoverable damages. In the event the inquest is held before a referee or a judicial hearing officer (JHO), the Court authorizes such referee or JHO to hear and report on the issue of recoverable damages and file a report pursuant to CPLR § 4320(b).¹ The parties shall then move to either confirm or reject the referee's report pursuant to 22 NYCRR § 202.44; and it is further

¹ In considering plaintiff's claim for reasonable attorney's fees, the assigned referee or JHO shall consider the factors articulated by the Court of Appeals in *Matter of Freeman* (34 NY2d 1, 9 [1974]) (see *Bd. of Mgrs. of Cent. Park Place Condominium v Potoschnig*, -AD3d-, 2016 NY Slip Op 00769 [1st Dept 2016]).

ORDERED that the fourth cause of action is dismissed as duplicative; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court

Dated: 2/19/16

Ellen M. Coin
Ellen M. Coin, A.J.S.C.

Check One:.....

CASE DISPOSED

NON-FINAL DISPOSITION