

Som v Perter Som, Inc.
2016 NY Slip Op 31539(U)
August 11, 2016
Supreme Court, New York County
Docket Number: 653193/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PETER SOM,

Index No.: 653193/2016

Plaintiff,

DECISION & ORDER

-against-

PETER SOM, INC.,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

This is an action to collect on a promissory note executed by defendant Peter Som, Inc. and made payable to plaintiff Peter Som (Plaintiff), defendant’s CEO. Plaintiff moves, pursuant to CPLR § 3213, for summary judgment on the Note in lieu of complaint. The motion is unopposed. For the reasons that follow, plaintiff’s motion is denied, on default, with leave to renew, upon submission of adequate proof of service.

“When an action is based upon an instrument for the payment of money only . . . , the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” CPLR § 3213. “An action comes within the ambit of CPLR 3213 if a prima facie case for nonpayment of a debt can be made out by the terms of the debt instrument itself; the only permissible extrinsic evidence would be simple proof of nonpayment or a similar de minimis deviation from the face of the document.” *Diversified Investors Corp. v DiversiFax, Inc.*, 239 AD2d 231, 233 (1st Dept 1997), citing *Weissman v Sinorm Deli*, 88 NY2d 437, 444 (1996). “It is incontestable that plaintiff [may] prove a prima facie case by proof of the note and a failure to make the payments called for by its terms.” *Seaman-Andwall Corp. v. Wright Machine Corp.*, 31⁵AD2d 136, 137 (1st Dept 1968).

In support of its motion, plaintiff submits a copy of the Note, and an affidavit attesting to defendant's failure to make payment on the Note. Under the terms of the Note, defendant promised to pay plaintiff \$808,000, at 4% interest per year, over a one year period from August 31, 2014 to August 31, 2015, in exchange for an \$808,000 loan. *See* Dkt. 4 (August 31, 2014 Secured Promissory Note) ¶¶ 1 & 2. An "Elana Nathan" signed the Note on behalf of defendant. *Id.* It is not clear from plaintiff's papers or the Note what relationship Ms. Nathan has to defendant, or whether she has the authority to sign for defendant. Nevertheless, plaintiff attests that as of June 15, 2016, the date of his affidavit, the entire aggregate unpaid principal of \$808,000 remained outstanding. Dkt. 3 (June 15, 2016 Affidavit of Peter Som) ¶ 12. There was an additional \$60,600 outstanding in accrued interest. *Id.* The Note also requires defendant to reimburse plaintiff for his collection costs if defendant fails to pay, including reasonable attorney's fees. Dkt. 4 ¶ 5.5.

Plaintiff alleges that on October 22, 2015, he "made written demand" to defendant for repayment of the Note. Dkt. 4 ¶ 9; Dkt. 5 (October 22, 2015 Payment Demand). Plaintiff attaches a copy of an 1-page, unaddressed, unsigned document, entitled "Payment Demand," directed to "Peter Som, Inc." *Id.* He does not state who at the defendant corporation, of which he his CEO, received the payment demand. Plaintiff alleges that despite his payment demand, and despite the Note having matured in August of 2015, defendant failed to repay any part of the loan. Dkt. 4 ¶ 10.

On June 20, 2016, plaintiff served defendant with process by delivering a copy of the summons and motion to himself, at 2 Horacio Street, #3A, New York, NY 10014, defendant's registered address for service of process. Dkt. 9 (Affidavit of Service) at 1. Plaintiff served an additional copy of the summons and motion on Elana Nathan, the individual who signed the

Note on behalf of defendant. According to the affidavit of service, plaintiff served Ms. Nathan by delivering a copy of the summons and motion to Ms. Nathan's assistant at Ms. Nathan's residence at 349 West 19th Street, New York, NY 10001, and by mailing a copy of the same to that address. Dkt. 9 at 2; CPLR § 308(2).

It is not clear who Ms. Nathan is or whether she is authorized to accept service of process on behalf of defendant pursuant to CPLR § 311(a)(1). Plaintiff's papers and his affidavit of service are silent on this issue. Accordingly, the court cannot determine whether service on Ms. Nathan pursuant to CPLR § 308(2) constitutes effective service on defendant. *See Hossain v Fab Cab Corp.*, 57 AD3d 484, 868 (2d Dept 2008) (service on corporation ineffective where there is no evidence that party served is authorized to accept service on corporation's behalf).¹

Additionally, the court cannot recognize plaintiff's attempt to serve defendant by delivering a copy of the summons and summary judgment motion to himself. The court has discretion to invalidate service based on a case's particular circumstances. *See Fashion Page, Ltd. v Zurich Ins. Co.*, 50 NY2d 265, 273 (1980) ("In evaluating whether service is to be sustained, the circumstances of the particular case must be weighed."). It is true that delivering a summons to a corporation's CEO will normally suffice as service on the corporation. *See* CPLR 311(a)(1) (permitting service on a corporation's officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive

¹ It is also not clear whether Ms. Nathan was authorized to execute a promissory note on behalf of Defendant. As a result, the court cannot enter default judgment against Defendant based solely on the promissory note. *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994) ("Some proof of liability is...required to satisfy the court as to the prima facie validity of the uncontested cause of action. The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts.").

service). The Court of Appeals has held that in general, a corporate officer's position is "such as to lead to a just presumption that notice to them will be notice to the corporation." *Id.* at 272.

Nevertheless, in this case, plaintiff's interests as defendant's CEO necessarily conflict with plaintiff's interests as the sole individual suing defendant in this lawsuit. The court cannot reasonably assume that service on plaintiff himself constitutes effective notice to defendant. That plaintiff saw fit to serve Ms. Nathan in initiating this lawsuit shows that he too choose not to solely rely on himself to accept service for defendant. The court finds that plaintiff's self-service does not give rise to a presumption of notice to defendant, and that plaintiff's service is inadequate.

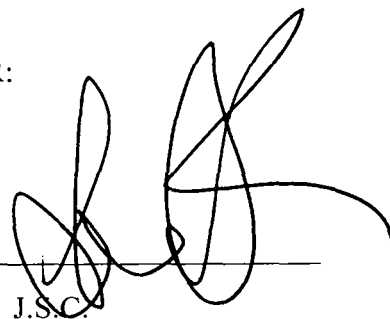
Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint against defendant Peter Som, Inc. is denied, on default, with leave to renew upon submission of proof that the Note was executed by an authorized agent of defendant, and adequate proof of service upon defendant, including, if necessary, amended affidavits and supporting papers; and it further

ORDERED that should defendant Peter Som, Inc. renew its motion for summary judgment in lieu of complaint, defendant will attach to the motion copies of the papers submitted in support of this motion, and a copy of this order with notice of entry.

Dated: August 11, 2016

ENTER:



A handwritten signature in black ink, appearing to read "Shirley Werner Kornreich", is written over a horizontal line. The signature is stylized and cursive.

SHIRLEY WERNER KORNEICH
J.S.C.