

Som v Peter Som, Inc.
2016 NY Slip Op 32222(U)
October 28, 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.

-----X

SHIRLEY WERNER KORNREICH, J.:

This is an action to collect on a promissory note (the Note) executed by defendant Peter Som, Inc., and made payable to plaintiff Peter Som, defendant's CEO. Plaintiff moves, for the second time, for summary judgment on the Note in lieu of complaint. CPLR § 3213. The motion is unopposed. For the reasons that follow, the motion is granted.

"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.*, 31 AD2d 136, 137 (1st Dept 1968).

On August 12, 2016, the court denied plaintiff's initial motion for summary judgment on the Note [Seq 001] without prejudice and with leave to replead. Dkt. 11¹ at 5. In its first motion, plaintiff provided a copy of the Note, a payment demand, and an affidavit attesting to defendant's failure to pay. *See* Dkt. 3-5. Plaintiff failed, however, to establish that the Note's signatory, Elana Nathan, had authority to enter into the Note on defendant's behalf. Plaintiff also failed to demonstrate proper service of process. Plaintiff remedies these defects here.

Here, plaintiff states in an affidavit that Ms. Nathan was defendant's shareholder, director, and president; she could serve as defendant's agent for service of process. Dkt. 14 [September 6, 2016 Amended Affidavit of Peter Som] ¶ 6; CPLR § 311(a)(1). Plaintiff explains that he and Ms. Nathan formed defendant in 1999 to "engage in the fashion and apparel industry." *Id.* He submits a Shareholders' Agreement, dated February 14, 2007, signed by an Elana Posner [Dkt. 15], whom he claims is Ms. Nathan. Dkt. 14 ¶ 6. The Shareholder's Agreement indicates that Posner owns 30% of defendant's "equity," and acted as defendant's president. Dkt. 15 at 3.

Plaintiff's affidavit goes on to describe how, from 2007 to 2014, plaintiff made a series of loans to defendant totaling \$808,000. Dkt. 14 ¶ 7. According to plaintiff, defendant executed the August 31, 2014 Note, which called for 4% annual interest, to memorialize the loans. *Id.* ¶ 8; Dkt. 16 [Secured Promissory Note] at 1 & ¶¶ 1-2. The Note provided for payment of attorney fees and costs on default. *Id.* at ¶ 5.5. Ms. Nathan purportedly had full authority to sign the Note on defendant's behalf, and defendant was represented by separate counsel. Dkt. 14 ¶ 8.

¹ References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system. Page numbers in citations to court documents refer to the page number of the .pdf filed on NYSCEF.

Plaintiff attests that as of September 6, 2016, the Note's entire aggregate unpaid principal of \$808,000 remained outstanding. Dkt. 14 ¶¶ 9-10. There was an additional \$60,600 outstanding in accrued interest. *Id.* ¶ 14. The Note also requires defendant to reimburse plaintiff for his collection costs if defendant fails to pay, including reasonable attorney's fees. Dkt. 16 ¶ 5.5.

On October 22, 2015, plaintiff sent defendant a written demand for repayment of the Note. Dkt. 17. Plaintiff's attorney addressed the demand to Ms. Nathan and defendant's attorney, the same attorney who plaintiff claims represented defendant in connection with the promissory note. *Id.*

On June 20, 2016, when defendant still had not repaid any portion of the Note, plaintiff served defendant, through Ms. Nathan, with a summons and a copy of plaintiff's original motion for summary judgment. Dkt. 9 at 2; CPLR § 311(a)(1). He did so 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). On September 9, 2016, after the court denied plaintiff's original motion, plaintiff served a copy of the instant, amended motion on defendant in the same manner, except that he delivered a copy of the motion to Ms. Nathan's co-tenant. Dkt. 30.

In light of plaintiff's amended submissions, plaintiff's motion for summary judgment is granted. *See 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."). Plaintiff avers, and the Shareholder Agreement confirms, that Ms. Nathan had the authority to enter into the Note on defendant's behalf. *See Lyon v W. Side Transfer Co.*, 132 AD

777, 117 (1st Dept 1909) (Acts of executive officers of corporation, within apparent scope of their authority in regard to its regular business, are presumed to be acts of corporation, and binding on it); *Mike Bldg. & Contracting, Inc. v Just Homes, LLC*, 27 Misc 3d 833, 849 (Sup Ct, Kings County 2010) (“The chief executive of a business entity is presumed to have authority to enter into contracts in the ordinary course of that entity’s business.”). Accordingly, it is

ORDERED that plaintiffs’ amended motion to for a default judgment [Motion Sequence 002] against defendant is granted, upon default, in favor of Peter Som and against Peter Som, Inc., in the amount of \$808,000 with interest of 4% running from August 31, 2014 to the date of entry of judgment and the Clerk shall enter judgment accordingly; and it is further

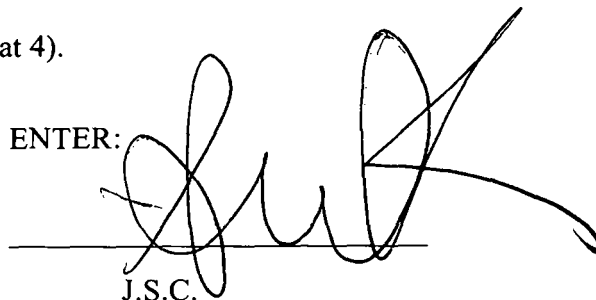
ORDERED that the request for attorney’s fees and costs shall be severed and shall continue, and an inquest to compute such amounts is referred to a Special Referee to hear and determine the reasonable amount of such fees; and it is further

ORDERED that within 14 days of the entry of this order on the NYSCEF system, plaintiff shall file a Note of Issue, pay the appropriate fees, and serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special Referee Clerk at spreffnyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee’s part for the earliest convenient date and notify all parties of the hearing date; and it is further

ORDERED that within 7 days of the entry of this order on the NYSCEF system, plaintiff shall serve a copy of this order upon defendant in the same manner set forth in court’s order to show cause dated May 5, 2015 (*see* Dkt. 10 at 4).

Dated: October 28, 2016

ENTER:



J.S.C.