100 Mile Fund, LLC v Weiss
2016 NY Slip Op 32483(U)
December 16, 2016
Supreme Court, New York County
Docket Number: 655288/2016
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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100 MILE FUND, LLC,

Index No.: 655288/2016

Plaintiff,

DECISION & ORDER

-against-

CHARLES WEISS, HARRIET MOUCHLY-WEISS, STRATEGY XXI HOLDINGS, INC., AND REPUTATIONAL RISK MANAGEMENT, INC.,

Defendants.
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SHIRLEY WERNER KORNREICH, J.:

This is an action to collect on a promissory note executed by defendants Charles Weiss, Harriet Mouchly-Weiss, Strategy XXI Holdings, Inc. (Strategy), and Reputational Risk Management, Inc. (Risk Management) (collectively, defendants), and made payable to plaintiff 100 Mile Fund, LLC. Plaintiff moves, pursuant to CPLR § 3213, for summary judgment on the Note in lieu of a complaint. The motion is unopposed. For the reasons that follow, plaintiff's motion is granted in part, and denied in part without prejudice and with leave to renew.

"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).

In support of its motion, plaintiff submits a copy of the Note, and an affidavit attesting to defendants' failure to make payment on the Note. Under the Note's terms, defendants promised to pay plaintiff monthly interest on a $1,350,000.00 loan for one year, from March 25, 2015 to March 24, 2016 (the Maturity Date). [1] *See* Dkt. 3 at 4 [March 25, 2016 Promissory Note] ¶¶ 1-3. The Note sets the interest rate at .0389% per day, calculated by dividing a 14% annual rate by 360 (the so-called "Actual/360 Computation" method). [2] *Id.* ¶ 2. Default interest, however, is 22% per year. Note ¶ 7 ("Default Rate"). Also, the Note provides for a late payment fee of 5% on the monthly interest payments. *Id.* ¶ 5. Dkt. 3 at 8. The Note's principal was due on March 24, 2016 (the Maturity Date), in a single, balloon payment. *Id.* at ¶ 3 ("On the last day of the month of the loan ... the outstanding interest shall be due and payable together with the principal amount of the loan in the amount of $1,350,000.00. This is a balloon payment note.").

Defendants paid all interest on the Note, as required, through March 24, 2016. *See* Dkt. 3 at 10. They also pre-paid approximately $163,000 of the Note's principal balance, and paid several thousand dollars into a reserve account. *Id.* But, plaintiff contends that defendants failed

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[1] The Note indicates that the parties secured it with a separate Security and Loan Agreement, Recognition Agreement, and an Absolute Assignment of Leases and Rents encumbering two cooperative units at 415 East 52nd Street in Manhattan. *Id.*¶ 4. Plaintiff does not provide those documents here.

[2] The court notes that while paragraph 2 of the Note (titled "Interest Rate") establishes what amounts to an approximately .0389% daily interest rate, paragraph 3 of the note (titled "Payment of Principal and Interest") requires defendants to pay $17,750.00 in monthly interest, a significantly higher amount. *See id.* ¶ 3. In plaintiff's damages spreadsheet [*see* Dkt. 3 at 10 (Calculation of Amount Due)], however, plaintiff appears to apply the .0389% rate to calculate interest accrued before the Note's Maturity Date. For example, for the 30-day period between February 25, 2016 and March 25, 2016, plaintiff claims $13,843.82 in accrued interest. *See* Dkt. 3 at 10.

to pay the remaining loan balance of $1,186,613.00 on the Maturity Date, thereby defaulting on the Note. *Id.* Plaintiff alleges that plaintiff has "made proper demand" to defendants for the amount due under the Note and that defendants have refused to pay. Dkt. 3 [October 5, 2016 Affidavit of William Procida] ¶ 4.

Beginning on March 25, 2016, plaintiff's increased the interest rate on the remaining principal balance to 22% -- the default rate. *See* Dkt. 3 at 10. On October 5, 2016, after defendants failed to pay the Note's principal balance or any accrued interest (except for one payment of $13,843.82) plaintiff commenced this action. Dkt. 1. It seeks $1,307,647.52 in damages, consisting of $1,186,613.00 principal, and $121,034.52 in unpaid interest.[3] Dkt. 3 at 10. Additionally, plaintiff seeks ongoing interest from defendants in the amount of $725.15 per day, attorneys' fees, and costs.

On October 6, 2016, plaintiff attempted to serve all defendants by delivering a copy of the summons and instant motion to defendant Charles Weiss, who plaintiff affirms was authorized to receive service on behalf of all defendants. *See* Dkt. 8 [October 26, 2016 Affidavit of Service]; CPLR § 308 & 311. It is not clear from plaintiff's papers, however, what Mr. Weiss's relationship is to the other defendants, or whether he was authorized to accept service on their behalf.

In light of plaintiff's submissions, plaintiff's motion for summary judgment is granted as to Mr. Weiss only. Plaintiff presents sufficient evidence that Weiss defaulted on the Note by failing to pay the principal balance on the Maturity Date, and by failing to make subsequent interest payments. *See Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994) ("Some proof of

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[3] Although plaintiff provides a list of alleged damages, it does not explain how it arrived at each line item set forth in its damages calculation; e.g. how plaintiff calculated the interest due on the Note, what interest rate it applied, and whether plaintiff imposed a late payment penalty.

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's request for attorneys' fees and costs against Mr. Weiss, however, is denied. "Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 (1989); *id.* at 492 ("A right to attorney's fees may not be inferred from an agreement unless the authorizing language is 'unmistakably clear.'). The Note does not provide for these costs as damages here, nor is there a statute providing for payment of counsel fees.

Plaintiff's motion is denied as to the remaining defendants, without prejudice, and with leave to renew. Plaintiff fails to explain how serving Mr. Weiss under CPLR § 308(a)(1) constitutes effective service on the remaining defendants under CPLR § 311(a)(1) (for the corporate defendants) or CPLR § 308(a)(2-6) (for Ms. Mouchly-Weiss). The court cannot determine, based on the evidence presented, whether plaintiff properly served Ms. Harriet Mouchly-Weiss, Strategy, or Risk Management, and cannot enter judgment against them. *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); *see also U.S. Bank Nat. Ass'n v Poku*, 118 AD3d 980, 981 (2d Dept 2014) ("On a motion for leave to enter a default judgment pursuant to CPLR 3215, movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim..."); *Rivera v Banks*, 135 AD3d 621, 622 (1st Dept 2016) (proof of summons service or other notice required to obtain default judgment). Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint [Motion Sequence 001] is granted, in part, on default, against defendant Charles Weiss only and the Clerk is directed to enter judgment in favor of plaintiff and against Mr. Weiss in the sum of $1,186,613.00, with interest at the rate of 22% per annum from the date of March 25, 2016, until the date of the decision of this motion, and thereafter at the statutory rate, as calculated by the Clerk; and it is further

ORDERED that the motion is otherwise denied, with leave to renew upon submission of adequate proof of service upon defendants Harriet Mouchly-Weiss, Strategy XXI Holdings, Inc., and Reputational Risk Management, Inc., including, if necessary, amended affidavits and supporting papers, and the action against them is severed and shall continue; and it further

ORDERED that should plaintiff renew its motion for summary judgment in lieu of complaint, plaintiff 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: December 16, 2016

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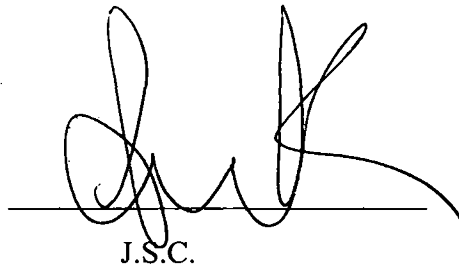

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C