

<b>Lopez v 99 Miles to Philly, Inc.</b>
2018 NY Slip Op 30244(U)
February 9, 2018
Supreme Court, New York County
Docket Number: 157726/2017
Judge: Robert D. Kalish
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

**PRESENT:** Hon. Robert D. KALISH  
*Justice*

**PART 29**

SALVADOR LOPEZ and JOSE RAMOS,

**Plaintiffs,**

- v -

**99 MILES TO PHILLY, INC. (d/b/a 99 MILES TO PHILLY), RED TRUCK DELIVERY, INC. (d/b/a 99 MILES TO PHILLY), 212 STEAKS, INC. (d/b/a 99 MILES TO PHILLY) and NEIL BARSKY,**

**Defendants.**

INDEX NO. 157726/2017

MOTION DATE 2/9/18

MOTION SEQ. NO. 001

The following papers, numbered 1-14, were read on this motion for summary judgment.

Summons—Notice of Motion—Affirmation in Support—Exhibits A-B—  
Memorandum of Law in Support—RJI—840A—Affs of Service

█ Nos. 1-11

Affirmation in Opposition—Aff of Service

█ Nos. 12-13

Reply Affirmation in Further Support

█ No. 14

Motion by Plaintiffs Salvador Lopez and Jose Ramos pursuant to CPLR 3213 for summary judgment in lieu of complaint against Defendants 99 Miles to Philly, Inc. (d/b/a 99 Miles to Philly), Red Truck Delivery, Inc. (d/b/a 99 Miles to Philly), 212 Steaks, Inc. (d/b/a 99 Miles to Philly) and Neil Barsky, jointly and severally, is granted.

## BACKGROUND

Plaintiffs' attorney states in his affirmation that Plaintiffs filed an action in the United States District Court for the Southern District of New York, on or about August 27, 2014, titled *Salvador Lopez, et al. v 99 Miles to Philly, Inc., et al.*, index number 14-cv-7001. Plaintiffs' attorney alleges that Plaintiffs and Defendants in the instant action were also Plaintiffs and Defendants in the federal case. Plaintiffs' attorney further alleges that the parties settled the federal case pursuant to a settlement agreement, annexed to the motion as exhibit A. Plaintiffs'

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

attorney further alleges that Defendants have breached the settlement agreement, and that \$82,500 is due and owing to Plaintiffs.

The settlement agreement appears to be executed by all parties. The settlement agreement states, among other things, that Defendants were to pay a total of \$90,000.00 to Plaintiffs' attorneys in twelve installments of \$7,500.00 each. The agreement indicates that the first installment was due on January 26, 2017. Each subsequent installment payment was to be made every 30 days thereafter.

Plaintiffs commenced the instant action on August 30, 2017, by e-filing a summons and notice of motion for summary judgment in lieu of complaint. Plaintiffs seek summary judgment against Defendants jointly and severally and an award of attorney's fees in an amount to be determined at an inquest.

### DISCUSSION

CPLR 3213 provides, in pertinent part, 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 settlement agreement may constitute an instrument for the payment of money. (*Park Union Condominium v 910 Union St., LLC*, 140 AD3d 673, 673 [1st Dept 2016].)

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form.” (*Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980] [internal quotation marks and citation omitted].) “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.” (*Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81 [2003].) “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

Plaintiffs' attorney alleges that Defendants made one payment, only, of \$7,500.00 on or about March 3, 2017. Plaintiffs' attorney further alleges that he noticed Defendants on March 24, 2017, as to the default and seeking a cure of the breach. Plaintiffs' attorney further alleges that Defendants have not cured the breach and that \$82,500.00 remains due and owing to Plaintiffs from Defendants.

Defendants' attorney argues that Plaintiffs have not submitted any proof as to firsthand knowledge (e.g., affidavits from Plaintiffs) as to the execution of the settlement agreement. Plaintiffs' attorney argues in reply that this assertion is "dubious." Plaintiffs' attorney further argues that Defendants do not deny that they entered into the settlement agreement and do not dispute that they have breached it.

The Court agrees. Based upon the settlement agreement, the checks were to be sent to Plaintiffs' attorney. Further, Plaintiffs' attorney appears to have sent the notice to cure to Defendants. As such, Plaintiffs' attorney is aware first-hand of the default in payment. Further, it was Plaintiffs' attorney who prepared the settlement agreement. As such, he has first-hand knowledge as to its execution.

Accordingly, Plaintiffs have shown prima facie that they are entitled to summary judgment in lieu of complaint by means of proof of the instrument and Defendants' failure to make the required installment payments. The burden having shifted on the instant motion, Defendants fail to raise a genuine issue of material fact.

**CONCLUSION**

Accordingly, it is

ORDERED that the motion by Plaintiffs Salvador Lopez and Jose Ramos pursuant to CPLR 3213 for summary judgment in lieu of complaint against Defendants 99 Miles to Philly, Inc. (d/b/a 99 Miles to Philly), Red Truck Delivery, Inc. (d/b/a 99 Miles to Philly), 212 Steaks, Inc. (d/b/a 99 Miles to Philly) and Neil Barsky, jointly and severally, is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Plaintiffs in the sum of \$82,500.00, with interest from February 26, 2017, at the statutory rate until entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk; and it is further


ORDERED that, on or before March 1, 2018, Plaintiffs shall serve a copy of this order with notice of entry upon Defendants; and it is further

ORDERED that, on or before March 1, 2018, Plaintiffs shall serve a copy of this order upon, and file a note of issue and statement of readiness with, the Trial Support Office (Room 158M); and it is further

ORDERED that, upon said filing and the payment of the appropriate fee, the Clerk of the Trial Support Office shall place this matter upon the trial calendar for an inquest as to attorney's fees.

The foregoing constitutes the decision and order of the Court.

Dated: February 9, 2018  
New York, New York

  
\_\_\_\_\_, J.S.C.  
**HON. ROBERT D. KALISH**  
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED       NON-FINAL DISPOSITION
- GRANTED     DENIED     GRANTED IN PART     OTHER
- SETTLE ORDER       SUBMIT ORDER
- DO NOT POST     FIDUCIARY APPOINTMENT     REFERENCE