

Douglas Elliman LLC v Schenone
2018 NY Slip Op 30297(U)
February 15, 2018
Supreme Court, New York County
Docket Number: 655127/2017
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

DOUGLAS ELLIMAN LLC,

Plaintiff,

-against-

MAGDA SCHENONE,

Defendant.

Index No.: 655127/2017
DECISION/ORDER
Motion Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion for summary judgment in lieu of complaint and defendant's cross-motion to dismiss under CPLR 3211 (a) (1) and CPLR 3211 (a) (7).

Papers	NYSCEF Documents Numbered
Plaintiff's Notice of Motion.....	2
Plaintiff's Memorandum of Law in Support.....	6
Defendant's Notice of Cross-Motion.....	10
Defendant's Memorandum of Law in Opposition.....	11
Defendant's Affidavit or Affirmation in Opposition and in Support of Cross-Motion.....	12-16
Plaintiff's Affirmation in Reply and in Opposition.....	18, 19
Plaintiff's Memorandum of Law in Reply and in Opposition.....	20
Defendant's Reply Affirmation in Support.....	22

Cole Hansen Chester, LLP (Michael S. Cole of counsel), for plaintiff.
Sutton Sachs Meyer, PLLC (Zachary G. Meyer of counsel), for defendant.

Gerald Lebovits, J.

Plaintiff, Douglas Elliman LLC, a national real-estate company, moves for summary judgment in lieu of complaint under CPLR 3213 against defendant Magda Schenone, an independent contractor and real-estate salesperson associated with plaintiff. Plaintiff's cause of action is for breaching two promissory notes arising from defendant's supposed failure to repay the outstanding loans due on March 28, 2017, and thereafter. Plaintiff seeks \$95,000, which represents the sum defendant owes plaintiff. Defendant cross-moves to dismiss the action in full under CPLR 3211 (a) (1), (7) and (8) on the ground that plaintiff has failed to demand conversion of the motion for summary judgment in lieu of complaint into a verified complaint or adequately plead any basis for jurisdiction.

I. Background

On November 4, 2016, defendant executed the first promissory note (“Promissory Note 1”) in the amount of \$100,000. (Motion, Exh A.) The interest rate was 10% if the principal sum were not repaid by November 30, 2018. (Motion, Exh A.) Defendant was obligated to repay the principal sum, with interest, on the earlier of:

- “(a) DE’s [Douglas Elliman LLC] receipt of commissions in which Maker [Magda Schenone] is entitled to share;
- “(b) Termination of the Maker’s association with DE; or
- “(c) November 4, 2018;

“In connection with the above, DE is hereby authorized to set off commissions received by DE and owed to Maker, against the principal balance of the Note.” (Motion, Exh A.)

On January 6, 2017, defendant executed the second promissory note (“Promissory Note 2”) in the amount of \$70,000. (Motion, Exh B.) The interest rate was 0% from the date of the note to the date of repayment. (Motion, Exh B.). Defendant was obligated to repay the total loan amount to

“DE on demand, and in any event no later than the earlier of:

- “a. Termination of borrowers [sic] association with DE, OR
- “b. January 31, 2017.

“All Such [sic] repayments shall be made via a deduction from the commission to be awarded in 15 E 69th Street 6D, NY NY with an estimate \$5.45 million sales volume.” (Motion, Exh B.)

On March 28, 2017, defendant terminated her association with plaintiff.

Plaintiff states that, by a letter agreement dated March 23, 2017, defendant has repaid only \$75,000 of the total amount \$170,000 due pursuant to the two promissory notes. (Affirmation, Exh A.) As such, a total of \$95,000 remains outstanding.

Defendant argues that repayments of both the promissory notes are unambiguously and expressly contingent on the closing of any outstanding real-estate transactions by the language of “DE is hereby authorized to set off commissions received by DE and owed to Maker, against the principal balance of the Note” in Promissory Note 1. Defendant further argues that, by a rental-commission slip dated March 24, 2017, plaintiff has received repayment of \$105,000 toward Promissory Note 1 (Defendant’s Memorandum in Opposition, Exh D), which discharged Promissory Note 1 and that plaintiff is not entitled to repayment of Promissory Note 2 because the contingency for repayment was never realized as the Promissory Note 2 mandates that “[a]ll Such [sic] repayments shall be made via a deduction from the commission to be awarded in 15 E 69th Street 6D, NY NY with an estimate \$5.45 million sales volume.”

II. Plaintiff's Motion for Summary Judgment in Lieu of Complaint

Plaintiff's CPLR 3213 motion for summary judgment in lieu of complaint is denied in part and granted in part. For a CPLR 3213 motion for summary judgment in lieu of complaint, a plaintiff must satisfy the standard for summary judgment in lieu of complaint and separately satisfy the standard for summary judgment. To prevail on a motion for summary judgment in lieu of complaint under CPLR 3213, the plaintiff must provide proof of an agreement for money only and the defendant's failure to pay. (*See Allied Irish Banks, PLC v Young Men's Christian Ass'n of Greenwich*, 36 Misc 3d 216, 219 [Sup Ct, NY County 2012]; *accord SCP (Bermuda) Inc. v Bermudatel Ltd.*, 224 AD2d 214, 216 [1st Dept 1996].) This debt must be acknowledged by the defendant and be apparent from the agreement alone. (*See Allied Irish Banks, PLC*, 36 Misc 3d at 216, citing *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996].)

The standard for a CPLR 3212 motion for summary judgment "is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial." (*Funding Group, Inc. v Water Chef, Inc.*, 19 Misc 3d 483, 486 [Sup Ct, NY County 2008], citing *Andre v Pomeroy*, 35 NY2d 361 [1974].) All the evidence submitted on a motion for summary judgment is construed in the light most favorable to the opponent of the motion. (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007].) The movant on a motion for summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law "by tender of evidentiary proof in admissible form" sufficient to eliminate any material issues of fact about the claim or claims at issue. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once the initial burden is established, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact." (*Id.*)

In support of its motion, plaintiff offers (1) an affidavit of Kenneth Harber, executive vice president and general counsel of plaintiff, Douglas Elliman LLC, (2) the promissory notes, (3) an affirmation from plaintiff's attorney, and (4) the letter agreement between plaintiff, defendant, and a non-party, Middlegate Funding LLC. In support of its opposition and cross-motion, defendant offers (1) an affidavit of defendant, Magda Schenone, (2) a rental-commission slip, (3) a check of commission payment, and (4) a reply affirmation from defendant's attorney.

The language of the Promissory Note 1 and the Promissory Note 2 show that they are instruments of money only. The repayments of the principal sum are not contingent or conditioned upon extrinsic events. The wordings of "DE is hereby authorized to set off commissions" in the Promissory Note 1 and "[a]ll Such [sic] repayments shall be made via a deduction from the commission" in the Promissory Note 2 are only payment arrangements between both parties.

Defendant's claim that the promissory notes are not agreements for money only is not supported by the evidence presented to this court.

It is unclear how much money defendant owes for Promissory Note 1. Plaintiff and defendant have provided conflicting evidence regarding the exact outstanding amount to be repaid by defendant. That demonstrates triable issues of fact. Plaintiff states that defendant has repaid only \$75,000 pursuant to a letter agreement dated March 23, 2017, while defendant argues

that plaintiff has received repayment of \$105,000 toward Promissory Note 1 by a rental-commission slip dated March 24, 2017. Because genuine issues of material fact exist for trial, plaintiff does not satisfy the requirement of a CPLR 3212 motion for summary judgment.

For Promissory Note 2, plaintiff, by providing evidence of Promissory Note 2, has met its burden of proof in demonstrating that defendant owes \$70,000. Defendant's argument that triable issues of fact exist about Promissory Note 2 is unavailing. Defendant argues that material issues of fact exist about whether the contingency for repayment of the Promissory Note 2 was met. But Promissory Note 2 does not make repayment contingent on the sale of the property at 15 East 69th Street, Apartment 6D, New York. Defendant had to pay plaintiff "on demand, and in any event no later than the earlier of: a. [t]ermination of borrower[s] association with DE, OR b. January 31, 2017."

Plaintiff's CPLR 3213 motion for summary judgment in lieu of complaint regarding Promissory Note 1 is denied, while its motion for summary judgment in lieu of complaint regarding Promissory Note 2 is granted. Plaintiff is granted a judgment against defendant for \$70,000 on Promissory Note 2. Plaintiff does not seek interest.

III. Defendant's Cross-Motion to Dismiss the Action in Full

Last, defendant asks this court to dismiss the action in full if this court denies plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213, as plaintiff has failed to demand conversion of the instant action into a complaint upon a prospective denial of plaintiff's motion and to plead any basis for this court's jurisdiction. This court has the discretion to decide whether the moving and answering papers shall be deemed the complaint and answer if the motion is denied pursuant to CPLR 3213. As triable issues of fact are demonstrated, plaintiff's action should not be dismissed in full, and the moving and answering papers shall be deemed the complaint and answer.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is granted in part and denied in part: that portion of the motion for a judgment on Promissory Note 1 is denied; that portion of the motion seeking a judgment on Promissory Note 2 is granted and plaintiff is awarded a judgment for \$70,000 against defendant;

ORDERED that defendant's cross-motion to dismiss this action in full is denied; and it is further

ORDERED that the moving and answering papers shall be deemed the complaint and answer;

ORDERED that plaintiff must serve a copy of this decision and order on defendant and on the County Clerk's Office, which is directed to enter judgment accordingly and to amend its records accordingly; and it is further

ORDERED that the parties appear for a preliminary conference on May 16, 2018, at 11:00 a.m., in Part 7, room 345, at 60 Centre Street.

Dated: February 15, 2018



J.S.C.
HON. GERALD LEOVITS
J.S.C.