

Wells Fargo Bank, N.A. v Monty Media Servs., LLC

2019 NY Slip Op 30722(U)

March 15, 2019

Supreme Court, New York County

Docket Number: 654812/2018

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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WELLS FARGO BANK, N.A.,

Plaintiff,

- v -

MONTY MEDIA SERVICES, LLC, JAMES ELKUS, YEVGENIYA
GUTIN ELKUS

Defendant.

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INDEX NO. 654812/2018
MOTION DATE 01/16/2019
MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 15, 16, 17, 18, 22, 23, 24, 25, 26

were read on this motion to/for

JUDGMENT - SUMMARY IN LIEU OF
COMPLAINT

In this action to recover upon a promissory note, the plaintiff moves pursuant to CPLR 3213 for summary judgment in lieu of complaint. No opposition is submitted. The motion is granted.

A plaintiff may seek relief under CPLR 3213 “[w]hen [the] action is based upon an instrument for the payment of money only.” See HSBC Bank USA v Community Parking Inc., 108 AD3d 487 (1st Dept. 2013); Allied Irish Banks, P.L.C. v Young Men’s Christian Assn. of Greenwich, 105 AD3d 516 (1st Dept. 2013); German Am. Capital Corp. v Oxley Dev. Co., LLC, 102 AD3d 408 (1st Dept. 2013). The purpose of the statute “is to provide an accelerated procedure where liability for a certain sum is clearly established by the instrument itself.” G.O.V. Jewelry, Inc. v United Parcel Service, 181 AD2d at 517 (1st Dept. 1992). Thus, in order to establish a prima facie entitlement to summary judgment in lieu of a complaint, a plaintiff must produce an instrument containing an “unequivocal and unconditional obligation to repay” (Zyskind v FaceCake Mktg. Tech., Inc., 101 AD3d 550, 551 [1st Dept. 2012]), one which by its terms is for the payment of money only over a stated period of time (see Bloom v Lugli, 81 AD3d 579,580 [2nd Dept. 2011]), and establish that the defendant failed to pay in accordance with those terms. See Zyskind v FaceCake Mktg. Tech., Inc., *supra*; Rhee v Meyers, 162 AD2d 397 (1st Dept. 1990). Under these guidelines, a promissory note may qualify as such an instrument, so long as the plaintiff submits proof of the existence of the note and of the defendant’s failure to make payment. See Bonds Financial, Inc. v Kestrel Technologies, LLC, 48 AD3d 230 (1st Dept. 2008); Seaman-Andwall Corp. v Wright Machine Corp., 31 AD2d 136 (1st Dept. 1968).

Here, the plaintiff has submitted the subject promissory note, dated November 21, 2014, and signed by the defendant James Elkus on behalf of the defendant Monty Media Services,

LLC (Monty), which establishes that Monty was obligated to repay the plaintiff \$150,000.00, in monthly installments beginning on December 15, 2014, by November 15, 2015, with interest at a floating rate of the prime rate plus 1.000% per annum. On January 8, 2016, and February 28, 2018, Monty entered into note modification agreements with the plaintiff which ultimately modified the interest rate to a fixed rate of 5.0% per annum, and extended the maturity date of the note until June 30, 2018. The plaintiff submits an affidavit setting forth the details of the transaction and stating that, as of June 30, 2018, \$107,230.36 remained due and owing under the promissory note. By this proof, the plaintiff has established an “unequivocal and unconditional obligation to repay” (Zyskind v FaceCake Mktg. Tech., Inc., supra) a sum over a stated period of time (see Bloom v Luqli, supra) and the defendant’s failure to pay in accordance with the terms of the promissory note and modifications. See Bonds Financial, Inc. v Kestrel Technologies, LLC, supra; Zyskind v FaceCake Mktg. Tech., Inc., supra.

The plaintiff further seeks an award of attorneys’ fees, as authorized pursuant to the terms of the plaintiff’s business lending disclosure, dated February 18, 2013, which are expressly incorporated into the terms of the promissory note. The plaintiff’s submissions, which include an unnotarized affirmation of attorneys’ fees and no separate accounting, bills, or invoices, are insufficient to establish the amount of attorneys’ fees to which the plaintiff is entitled. Therefore, the court refers the issue to a Judicial Hearing Officer or Special Referee.

The plaintiff also submits separate continuing, unlimited commercial guaranties executed by the defendants James Elkus and Yevgeniya Gutin Elkus, on November 21, 2014, in which those defendants guaranteed repayment of Monty’s indebtedness under the promissory note and all costs, expenses, and attorneys’ fees in connection with or relating to the collection and enforcement of the amounts due to the plaintiff pursuant to the note. Thus, pursuant to the guaranties, the defendants James Elkus and Yevgeniya Gutin Elkus shall be jointly and severally liable for the judgment entered against Monty arising from its obligations under the underlying promissory note and modifications.

Accordingly, it is

ORDERED that the plaintiff’s motion for summary judgment in lieu of complaint (CPLR 3213) is granted, without opposition, and the plaintiff shall have judgment against the defendants, jointly and severally, in the sum of \$107,230.36, plus costs and interest at a rate of 5.0% per annum from June 30, 2018, and it is further,

ORDERED that the Clerk shall enter judgment accordingly; and it is further,

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of the amount due to the plaintiff for attorneys’ fees and costs under the subject agreements; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel for the plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the plaintiff shall serve a proposed accounting of attorneys' fees within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of the plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and, upon disposition of that motion, Plaintiff may enter an amended judgment adding the award of attorneys' fees and costs to the amount recovered, if any; and it is further,

ORDERED that the plaintiff shall serve a copy of this order upon the defendants within 15 days of this order.

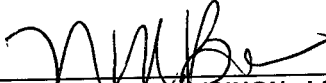
This constitutes the Decision and Order of the court.

3/15/2019
DATE

CHECK ONE: CASE DISPOSED GRANTED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON